Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, ET AL.,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION AND FORD MOTOR COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Seventh Circuit's holding under Fed. R. Civ. P. 23(b)(3) that "no class action is proper unless all litigants are covered by the same legal rules," which conflicts with the law of the Third, Fifth, Ninth and D.C. Circuits, and would eliminate the possibility of nationwide class actions where choice of law rules dictate application of the law of multiple states, be squared with the plain language of the Rule, which permits class actions when "questions of law or fact common to the members of the class predominate over any question affecting only individual members"?

2. May a federal court, consistent with the principles of federalism and *Erie v. Tompkins*, 304 U.S. 64 (1938), impose a tort-only theory of recovery of its own devising to supplant well-established state law causes of action asserted by plaintiffs for breach of warranty, consumer protection and unjust enrichment?

3. Can the Court of Appeals' determination that, under Fed. R. Civ. P. 23(b)(3), refusal to certify a class would be "superior" to certification because plaintiffs would be unable to proceed with their small value claims on an individual basis be squared with this Court's teaching in *Amchem Products v. Windsor*, 521 U.S. 591, 617 (1997) – or with the decisions of the other Courts of Appeals consistent with it – that Rule 23(b)(3) class actions are particularly appropriate where individual plaintiffs' recoveries would be small rendering individual prosecutions infeasible?

4. Is the Seventh Circuit correct in interpreting "efficient adjudication" under Rule 23(b)(3) to require "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," even for small value economic claims where such costly trials will likely never take place, in order to create a "market" of judgments so that an "accurate" settlement value for other claims may be established, or does "efficient," as this Court and other Courts of Appeals have long held, refer to the conservation of judicial resources and the avoidance of duplicative litigation?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are 229 individual purchasers or lessees of certain Ford Explorers or Firestone tires. A list of their names is included at Appendix F, Pet. App. 82a. In this action, Petitioners sought certification of, and the district court certified, two nationwide classes of such purchasers or lessees defined as:

> All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 . . . or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 . . . .

Pet. App. 73a. And:

> All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as [these] tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar to [these] tires.

Pet. App. 73a-74a.

Respondents are Bridgestone Corp., its wholly owned subsidiary Bridgestone/Firestone, Inc., and the Ford Motor Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 288 F. 3d 1012 (7th Cir. 2002), and is reprinted as Appendix A, Pet. App. 1a-13a. The opinion and order of the United States District Court for the Southern District of Indiana granting Petitioners' motion for class certification are reported at 205 F.R.D. 503 (S.D. Ind. 2001). The opinion is reprinted as Appendix B, Pet. App.14a-71a; the order is reprinted as Appendix C, Pet App. 72a-75a. The order of the Seventh Circuit denying Petitioners' timely petition for rehearing is unreported and is reprinted as Appendix D, Pet. App. 76a-77a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 2, 2002. A timely petition for rehearing was denied on June 5, 2002. Pet. App. 76a. On August 13, 2002, Justice Stevens extended the time for filing this petition for certiorari through and including October 3, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The relevant portions of Federal Rule of Civil Procedure 23 are reprinted as Appendix G, Pet. App. 86a-87a.

INTRODUCTION

This case presents a uniquely compelling opportunity to instruct the divided lower courts on the appropriate use of Rule 23 in the litigation context. Three times in the past six years, this Court has reviewed the parameters of Rule 23 in the context of settlement. See *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *Amchem Products v. Windsor*, 521 U.S. 591 (1997); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In doing so, the Court has expressly reemphasized the importance and presumptive propriety of the litigation class action in settings, such as consumer litigation, where prosecution absent the aggregation offered by Rule 23 would render the substantive claims unenforceable. The instant case

is the most high profile consumer case to reach the courts in many years and the opinion of the Court below would render ineffectual this Court's careful attempts to preserve the utility of the small-value class action.

STATEMENT OF THE CASE

This litigation arises from the highly publicized failures of defective tires and automobiles produced by Respondents Bridgestone/Firestone, Inc., Bridgestone Corporation, and Ford Motor Company. The gravamen of the complaint is that Respondents intentionally concealed uniform inherent defects designed into millions of Firestone tires and Ford Explorers. These widely-publicized defects have caused hundreds of deaths and thousands of personal injuries among consumers and have resulted in the aggregate in enormous economic loss to purchasers.

This case involves certification of a class action to assert economic loss claims occasioned by the sale of defective tires and vehicles that Respondents knew to be inherently unsafe and therefore not worth what consumers paid for them. These claims are based upon well-established and long-recognized state law causes of action for breach of warranty, consumer protection and unjust enrichment. The classes expressly exclude all claims for personal injury or death by those who suffered the most grievous misfortune from their purchase. Instead, the classes are limited to consumers who paid too much for the tires and vehicles with these concealed defects and who were and are put at risk of death or serious injury from the products unless they pay to replace them at their own cost.[1]

A. Following a series of serious accidents involving Firestone tires and Ford Explorers, a large number of

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[1]These classes include purchasers whose tires were never recalled or replaced by either NHTSA or Respondents. Respondent Ford has never recalled or replaced any of the Ford Explorers at issue.

consumer class actions were brought against Respondents in federal courts in multiple jurisdictions around the United States. These were transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Southern District of Indiana. See 28 U.S.C. §1407.

Following transfer, plaintiffs in all these consumer class actions filed the Master Complaint in the instant action in the MDL district court. The complaint alleges that certain Firestone tires share a uniform design defect that results in an unreasonably dangerous propensity to suffer tread separation at normal driving speeds, and that certain Ford Explorers share a uniform design defect that results in an unreasonably dangerous propensity to roll over under foreseeable driving conditions.

The fundamental design and manufacturing process of all the tires at issue originated with models developed as original equipment for the Explorer by Respondent Bridgestone/Firestone, Inc. ("Firestone") and its parent, Respondent Bridgestone Corporation ("Bridgestone"), pursuant to the specifications of Respondent the Ford Motor Company ("Ford"). The complaint alleges that Respondents collaborated on a tire design that was insufficiently "robust" to perform safely. The complaint further alleges that, in order to compensate for the stability defects in the Explorer, Respondents agreed to lower the recommended tire pressure on the original equipment Firestones from the 35-psi recommended by Firestone to 26-psi. This further increased the inherent risk of tread separation and other catastrophic tire failures but failed to eliminate rollovers.

In preliminary proceedings the district court dismissed Petitioners' tort claims, as well as certain individual claims for property damage, see *In re Bridgestone/Firestone, Inc.*, 155 F. Supp. 1069 (S.D. Ind. 2001), and deemed claims for injunctive relief pre-empted by the federal statute authorizing action by the National Highway Traffic Safety Administration (NHTSA). See *In re Bridgestone/Firestone, Inc.* 153 F. Supp.

935, 938, 943-948 (S.D. Ind. 2001).

The common theory of the surviving warranty, consumer protection and unjust enrichment claims is that the tires and Explorers were defective at the time of sale, that Respondents uniformly concealed these defects, and that – because the products were not what they were supposed to be – their purchasers were economically injured at the instant when they purchased them. These are the only claims whose viability as a class action are at issue on appeal. As the district court recognized, Pet. App. 66a n. 44, these consumer transaction claims each have such small value that they would likely not be brought as individual actions because the costs of litigation would exceed the expected recovery. Individually, they are what courts have termed "negative value" claims.[2]

The district court also determined that, under Indiana choice of law rules,[3] the law of Michigan, where Respondent Ford has its principal place of business and made all decisions relevant to Petitioners' claims, applied to the claims against Ford, and that the law of Tennessee, where Respondent Firestone has its principal place of business and made all decisions relevant to Petitioners' claims, applied to the claims against Firestone and Bridgestone. 155 F. Supp. at 1078-1086; see also Pet. App. 15a-24a (reaffirming this ruling).

In the decision at issue here, the district court certified, under Fed. R. Civ. P. 23(a) and (b)(3), a class of purchasers or

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[2]"Negative value claims are claims in which the costs of enforcement in an individual action would exceed the expected individual recovery." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 348 (N.D. Ohio 2001).

[3]Because all class claims were refiled in Indiana in a Master Complaint, only Indiana choice of law rules were at issue. It is well-settled that a federal court hearing state law causes of action must use the choice of law rules of the state in which it sits. See *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); see also *In re Bridgestone/Firestone, Inc.*, 155 F. Supp. at 1078.

lessees of 1991 to 2001 model year Ford Explorers and a class of purchasers or lessees of vehicles equipped with Firestone tires sold under six trade names.[4] It also certified six carefully crafted subclasses of the "Tire Class," and one subclass of the "Explorer Class" under Fed. R. Civ. P. 23(c)(4).[5] It subsequently issued its opinion explaining its decision to certify these classes.

First, the district court found the requirements of Rule 23(a) easily satisfied,[6] noting that "[t]he briefing of the parties reveals that there are no real disputes among them as to [Petitioners'] ability to make these showings," Pet. App. 34a n. 16. See Pet. App. 34a-38a.

It then turned to Rule 23(b)(3) which required the court to "find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

1. a. In determining predominance, the district court found that "defect" – the issue upon which all the remaining claims before the court would turn – "can be demonstrated (or disproved) with common proof." Pet. App. 40a-44a. Reviewing an extensive factual and technical record, the court

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[4]The definition of the "Explorer Class" and the "Tire Class," which are reprinted in relevant part *supra* at ii, can be found in full at Pet. App. 73a-74a.

[5]The "Explorer Sub-class" is defined at Pet. App. 73a. The six Tire Sub-Classes are defined in paragraphs 1-6 of Plaintiffs' Class Structure/Class Definitions, Appendix E, Pet. App. 79a-81a, incorporated by the district court by reference in its order granting class certification. See Pet App. 74a n. 2.

[6]Rule 23(a) is reprinted at Pet. App. 86a. In order for a class action to be certified, the party seeking certification must meet the requirements of Rule 23(a) and those of one of Rule 23(b)(1), (b)(2) or (b)(3). See Fed. R. Civ. P. 23(b).

found that the tires at issue were similar in all relevant respects, rejecting Respondents' contention that Petitioners' claims involved "over 280 distinct tire populations." Id. 41a. The district court found "persuasive evidence that Firestone has significantly exaggerated distinctions among the Tires." Id. 41a. The court credited testimony about common components in the tires Petitioners claim are defective, and testimony undermining Respondents' claims that differences among the tires are significant. Id. 41a-42a. The district court also found Ford's argument that the Explorers at issue differed "not persuasive," noting that, for example, all the relevant Explorer models and years were treated "the same for many purposes" by Respondent Ford itself. Id. 42a-43a.

b. As to other common issues, the court examined carefully each claim in turn.

i. On Consumer Protection, the court concluded that because common evidence would be used to show common representations and omissions by Ford and common omissions by Firestone, common issues predominated. See Id. 45a-51a.

ii. On Express Warranty, the court found that the relevant language in all the Firestone warranties (with the possible exception of a "commercial use" exclusion) was identical, and that its breach – upon sale of the tires, not upon their failure – would be shown by classwide proof. Id. 52a-53a. The court also found the relevant language in all the Explorer warranties identical. Id. 53a. It concluded that "[t]hese common issues predominate the Plaintiffs' claims for breach of express written warranties." Id.

The district court refused, however, to certify claims for breach of express warranty created by advertising because such claims would require proof of each plaintiff's exposure to Respondents' advertising. Id. 56a-58a. Similarly, the district court refused to certify "express warranty claims based upon oral representations made to them at the time of sale." Id. 58a.

iii. On Implied Warranty, the court concluded that the common question of defect predominated with respect to any determination about breach of the implied warranty of merchantability. Id. 58a. The court recognized that the question of privity, relevant only to the claims against Firestone under Tennessee law, would not be uniform for all plaintiffs. It concluded, though, that "the[] types of sellers also can be divided into discrete subclasses based upon the sellers' relationship, if any, with Firestone." Id. 60a. It concluded that differences with respect to privity did not defeat predominance of common issues.

iv. On Unjust Enrichment, the court concluded that the common issues – defect and whether Respondents were unjustly enriched – predominated. The court, recognizing that plaintiffs' claims are for the excess amounts received by the Respondents at the time of sale, rejected the idea that proof of an individual vehicle's resale value, which is not at issue in this case, defeated predominance. The court recognized that each plaintiff's compensation would depend only on "evidence of when and from whom each Plaintiff purchased the vehicle or tires" since the relevant question was the wholesale price received by the defendants, precluding a need for examination of the price paid by each consumer. The court held that "those straightforward factual questions are not the type of individual issues that defeat a finding of predominance." Id. 61a-62a.

v. Finally, the court denied certification of a subclass of property damage claims, finding that common issues would not predominate for these claims. Id. 63a.

2. In determining superiority, the court examined in turn the four factors explicitly identified by the Rule as "pertinent:"[7]

First, it found – unsurprisingly given the small value of

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[7]See Fed. R. Civ. P. 23(b)(3).

each claim – that no actions alleging these harms had been brought by individual plaintiffs. Consequently "the interest of members of the class in individually controlling the prosecution or defense of separate actions," Fed. R. Civ. P. 23(b)(3), did not counsel against certification. Pet. App. 64a.

The court concluded that MDL consolidation "militate[d] in favor of certification." Id. And, it concluded that absent certification, "if individual Plaintiffs wish to continue pursuing their claims, either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. Such a result would be immensely burdensome to the courts, parties, and witnesses." Id. 66a (footnote and citation omitted). Relying on this Court's teaching in *Amchem* that class actions are designed to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," the court also noted that, because of their small value and the high cost of litigation, absent certification, "most Plaintiffs would drop their claims." Id. 62a n. 44 (citing *Amchem*, 521 U.S. at 617).

Finally, the court concluded that the trial envisioned by Petitioners was manageable:

> [T]he individual issues in this case are not nearly as daunting as [Respondents] claim. . . . Most of the distinctions to which [Respondents] refer are completely immaterial and therefore will not create the need for subclasses. As noted above, legally relevant distinctions . . . can be managed through subclassing, a procedure that commends itself in practical terms and is specifically authorized by Rule 23(c)(4)(B).

Id. 66a-67a.

Respondents argued that there were what they described as "superior" methods for resolving these cases, but the district court rejected the two they proposed. First, it concluded that "MDL treatment" – which applies only to pretrial proceedings,

see 28 U.S.C. §1407(a) – "can take a dispute only so far." Id. 69a. Next, it rejected the idea that the NHTSA process for investigating and remedying consumer complaints would be a "superior method for the fair and efficient adjudication of the controversy." See Fed. R. Civ. P. 23(b)(3): "While we recognize the role that NHTSA plays in promoting highway safety, we also are aware that the remedies available to NHTSA are not the same as those available through the judicial process. Courts should not cede their proper role to an administrative agency." Pet. App. 70a (citation omitted).

B. The United States Court of Appeals for the Seventh Circuit granted Respondents' Rule 23(f) petitions for interlocutory appeal and, in an opinion by Judge Easterbrook, reversed. Id.1a-13a.

The Court of Appeals concluded that class certification under Rule 23(b)(3) was improper because there could be no "finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" Id. 10a-11a (citing Fed. R. Civ. P. 23(b)(3)).

1. The Court first asserted categorically, despite the plain language of Rule 23, that "[n]o class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3)." Id. 3a.

The Court concluded, contrary to the district court, that Indiana choice of law rules would apply the law of each state in which the vehicles and tires had been acquired, not the law of the defendants' home states, to warranty, consumer protection and unjust enrichment claims. Id. 4a-9a.

Rather than engaging in an independent reassessment of whether common questions of law or fact still predominated, because, for example, of the similarity of various applicable

states' laws or remanding to permit the district court to engage in such a reassessment in the first instance – the approach taken by several other Circuits – the Seventh Circuit held: "Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." Id. 9a.

2. In a remarkably bald piece of dictum, the Court also asserted that statewide classes – something not at issue in this appeal – also could not be certified. See id. ("Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, we add that this litigation is not manageable as a class action even on a statewide basis.") Without reference to the fact-finding below, the Court listed a number of purported differences among Explorers, including whether vehicles had been resold, and whether they had been driven off road, differences "affect[ing] resale price." Id. 9a-10a. It also claimed to find differences among the Firestone tires that it thought were relevant to Petitioners' claims, concluding that "the [differences] we have mentioned preclude any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.' Fed. R. Civ. P. 23(b)(3)." Id. 10a-11a. With respect to the tire class, the Court said that because of the purported differences between tires "it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform." Id. at 11a

This assessment was apparently based on a misunderstanding of Petitioners' claims, the elements of which, again, the Court did not examine. Indeed, most of the differences listed, as the district court found, bear no relationship to the Petitioners' causes of action. For example, the Court said, "Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to

underinflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may have been higher in Arizona than in Alaska." Id. 9a-10a. It also said, "The tire class includes many buyers who used Firestone tires on vehicles other than Ford Explorers, and who therefore were not advised to underinflate their tires." Id. at 10a.

Petitioners' claims, however, do not depend on how, or where, their Explorers or Firestone tires were used (including the level of tire inflation). These are not, for example, tort actions in which contributory negligence might be relevant. Petitioners present warranty, consumer protection and unjust enrichment theories, none of which requires a showing that a particular tire failed or turns in any respect on how it was used, but only that the Explorers and the tires each suffered from common, uniform defects at the time of sale and thus were not worth what consumers paid for them.

Similarly, the Court's discussion of other, extrinsic facts bearing on resale value of the Explorers, as the district court properly recognized, have no relevance to Petitioners' claims that the tires and vehicles were inherently defective and hence of compromised value when they were originally purchased.

3. As to superiority, the Court of Appeals took an unprecedented tack. The Rule requires that "a class action" be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court of Appeals, though, took issue with the very judgment of state lawmakers in providing state law causes of action for the failure to render the value promised when a manufacturer sells a defective product.

In the Court's view, the optimal "incentives" for manufacturers to take due care would instead be provided by a system that allowed recovery only to those suffering physical injury from the failure of defective products. Pet. App. 6a and n. 1. The Court concocted a hypothetical economic model to prove this, arguing that full recovery in

tort alone to all those injured or killed would "create[] both the right compensation and the right incentives." Id. at 6a n. 1.[8]

Consequently, and remarkably, the Court – recognizing that, because of their small value, these claims were unlikely to be brought except as part of a class action – concluded that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury" would be "far superior" to litigation by people it described as "uninjured buyers," "for dealing with consumer products that are said to be failure prone." Id. 11a. Rather than evaluating what method would most fairly and efficiently adjudicate the claims made by Petitioners against Respondents, the court crafted a rule of its own devising that, regardless of the recognition of economic loss consumer claims under state law, such claims ought not

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[8]The Court spun out its theory as follows:

> Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only $9,500 per widget–for the expected per-widget cost of injury is $500–and each buyer could have used the difference in price to purchase insurance (or to self-insure, bearing the risk in exchange for the lower price). On this theory the 990 uninjured buyers would collect a total of $495,000. The manufacturer's full outlay of $995,000 ($500,000 to the 10 injured buyers + $495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product's defect. This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system–$500 in damages to every buyer, or $50,000 in damages to every injured buyer–creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess precautions.

Id. 6a n. 1 (citations omitted).

to be adjudicated at all.

4. Finally, the Court concluded that the district court had misunderstood the nature of the "efficiency" that Rule 23(b)(3) is designed to implement.

Having listed some purported differences among Explorers and tires included in the certified classes, the court said that although the district judge understood that "differences within the class would lead to difficulties in managing the litigation," she had concluded that it would be more efficient "to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law." Id.

The Court, though, rejected the very premise of the district court's conclusion. Despite the fact that the district court looked at precisely the type of efficiency in allocation of judicial resources required by Rule 23, the Court of Appeals derided "the vision of 'efficiency'" employed by the district court as "the model of the central planner," rather luridly comparing the ordinary judicial task of determining whether a class should be certified under Rule 23 to the work of the defunct Soviet planning organ "Gosplan or another central planner." Id. "When courts think of efficiency, they should think of market models rather than central-planning models," the Court said. Id. 12a. A class action would, the Court concluded, be less "efficient" because it would "suppress information that is vital to accurate resolution." Id. 11a.

The Court's view of efficiency did not refer to the speed of resolution, the elimination of costs, the avoidance of duplication of effort, and the conservation of judicial resources, nor did it make reference to the very factors that Rule 23(b)(3) specifies are "pertinent" to the required finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." See Fed. R. Civ. P. 23(b)(3). Instead, the Court invoked a purported need for "diversified decisionmaking to supply and evaluate information" about the value of each claim and

concluded that "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," Pet. App. 12a (internal quotation marks and citation omitted), was preferable to the class action certified by the district court. It reached this conclusion despite the district court's finding that these were negative value claims such that this decentralized process would never, in fact, occur.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Determination that Rule 23(b)(3) Can Only Be Satisfied Where All the Plaintiffs are Subject to the Same Law Conflicts with the Decisions of the Third, Fifth, Ninth and D.C. Circuits and with the Plain Language of Rule 23(b)(3).

The Court below held that the requirements of Rule 23(b)(3) cannot be satisfied unless all plaintiffs are subject to the same law. In this, its decision conflicts with those of at least the Third, Fifth, Ninth and D.C. Circuits, as well as the plain language of the Rule. These other Circuits, when faced with motions for certification even of nationwide classes in which the law of different states will apply, have examined the variations among the laws of the different states to determine whether, in light of those variations, the requirements of the Rule "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are met. Fed. R. Civ. P. 23(b)(3).[9] In the

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[9]Indeed, not only does the plain language of the rule make clear that what must be shown is not uniformity, but only that "common questions of law or fact predominate," id., the very structure of the Rule reinforces this. Rule 23(c)(4) is specifically designed to address issues of manageability related to differences in, among other things, applicable law. "The Court can overcome difficulties created by variations in state law through the judicious use of subclasses." *Rivera v. Wyeth Ayerst Labs*, 197 F. R. D. 584, 591 (S.D. Tex. 2000).

non-personal injury context in particular, these courts have adhered to this Court's observation in *Amchem* that "predominance is a test readily met in certain cases alleging consumer or securities fraud . . . " 521 U.S. at 624.

Thus the Third Circuit, for example, has more than once upheld class certification of a nationwide class in non-personal injury, economic loss cases in which different state laws applied. See *In re Asbestos School Litigation*, 789 F. 2d 996, 1010 (3d Cir.), cert. denied, 479 U.S. 852 (1986); *In re Prudential Ins. Co of America Sales Litigation* ("*Prudential*"), 148 F. 3d 283 (3d Cir. 1998). In *In re Asbestos School Litigation*, certification under Rule 23(b)(3) was found appropriate where the plaintiffs had made a creditable showing that different state laws could be broken down into approximately four patterns. See *Georgine v. Amchem Products*, 83 F. 3d 610, 627 n. 13 (3d Cir. 1996), aff'd. sub nom. *Amchem v. Windsor*, 521 U.S. 591 (1997) (describing *In re Asbestos School Litigation).*

Similarly in *Prudential*, the court affirmed certification and held that predominance was "not defeated because the class claims are subject to the laws of the fifty states." 148 F. 3d at 315. The court said:

> Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. . . . In this instance [appellant] has failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach. . . . . The [district] court concluded that the "elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns." Id. The district court "considered the choice of law issues that confronted the Court and concluded that these choice of law issues [did] not render this class action unmanageable." Id. We agree.

Id. (citations and footnotes omitted).

The Ninth Circuit, too, has taken this approach and has found a nationwide class to meet the 23(b)(3) requirements for certification in a non-personal injury consumer case in which, just as in this one, different state laws applied:

> Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985). In this case . . . the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and "lemon laws." Individual claims based on personal injury or wrongful death were excluded from the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998). *Hanlon* squarely conflicts with the decision below.

The approach taken by these courts of examining the differences among the relevant state laws has been followed by other Circuits as well. Thus, the Fifth Circuit has held that the proper procedure where class certification is sought and different state laws will apply is to assess the way in which "variations in state law affect predominance and superiority." See, *e.g.*, *Castano v. American Tobacco Co.*, 84 F. 3d 734, 741 (5th Cir. 1996). That court has stated, "[p]rior to certification, the district court must determine whether variations in state law defeat predominance," id. at 750, and it has adopted the procedure followed by the Third Circuit in *In Re Asbestos School Litigation*. See id. at 742. The Court of Appeals here deprived the district court of the opportunity to conduct such an analysis.

Similarly, while sitting as a Circuit Judge on the D.C. Circuit, Justice Ginsburg jointly writing for that court held:

> A considered predomination determination by the District Court . . . must be made. As the Third Circuit observed in *In re Asbestos School Litigation*, to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an "extensive analysis" of state law variances, "that class certification does not present insuperable obstacles." . . . The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.

Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987) (internal quotation marks and citations omitted).[10]

The split between the Seventh Circuit and these other Courts of Appeals is real and requires resolution by this Court now. District courts in the Seventh Circuit are already applying the "uniformity" requirement created by the Court of Appeals in this case. Thus, for example, last month the District Court for the Northern District of Illinois denied certification of a nationwide class in reliance upon the decision below. It said in relevant part:

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[10]Indeed, this is the ordinary method for evaluating the propriety of class certification in these circumstances. See, *e.g.*, *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 956-57 (E.D. Tex., 2000) (recognizing that basic warranty law under the UCC is uniform and that "[f]or decades, courts have certified [national] product defect class actions"); *Duhaime v. John Hancock Life Ins. Co*, 177 F.R.D. 54, 64 (D. Mass. 1997) ("Insofar as the class members assert claims for fraud or misrepresentation under various state laws, the differences among these laws do not appear to be so great as to undermine the predominance of the common questions of law or fact.").

> Just recently, the Seventh Circuit has stated that "no class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R Civ P. 23(a), (b)(3)," *In re Bridgestone/Firestone, Inc.*, 288 F. 3d 1012, 1015 [Pet. App. 3a] (7th Cir. 2002). Differences in state law on theories presented in a putative class action have led the Seventh Circuit to hold that the actions may not proceed as a nationwide class. Id. Therefore, uniform law on invasion of privacy, intrusion into seclusion, and unjust enrichment is essential for certification of a requested nationwide class.

In re Trans Union Corp. Privacy Litig., 2002 U.S. Dist. LEXIS 17209, at *40 (N.D. Ill. September 10, 2002). Indeed, lower courts in other jurisdictions, too, are already citing the rule announced below in denying class certification. See, *e.g.*, *In re Rezulin Products Liability Litigation*, 2002 U.S. Dist. LEXIS 17204, at *37 (S.D.N.Y. September 12, 2002) (denying class certification by holding that "'[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a nationwide class action is not manageable'") (quoting the decision below, Pet. App. 9a).

Finally, this case presents an appropriate vehicle for addressing this split because, having concluded that the laws of the class members' states would apply to Petitioners' claims, the court below neither engaged in the analysis of the variations among those laws that is required by Rule 23(b)(3), nor remanded for consideration of that problem by the district court in the first instance. Cf. *Castano*, 741-744 (explaining the extensive analysis of state law variations that the district court must undertake).[11]

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[11] Indeed, although it is unnecessary to the certiorari calculus, had the court below undertaken the proper analysis here, it would have concluded that certification is proper. In the district court Petitioners introduced

B. The Court's Conclusion that Litigation of Tort Claims By Third Parties and Regulation by NHTSA Would Be "Superior" to Permitting Plaintiffs to Proceed With Their Non-Tort State Law Causes of Action Usurps the States' Lawmaking Power in Violation of the Fundamental Principle of Federalism Announced in *Erie v. Tompkins*.

The Court's superiority analysis departs from the text of Rule 23, its underlying purposes, and its interpretation by the other Courts of Appeals.

By its terms Rule 23 requires a finding "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court here found, however, in light of its theory that actions for warranty, consumer protection or unjust

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extensive evidence, ignored by the Court of Appeals, demonstrating that the laws of the fifty states with respect to warranty, consumer protection and unjust enrichment are essentially identical with regard to the issues relevant in this case. For the Court's convenience, that evidence is reprinted as Appendix H, Pet. App. 88a-156a.

Nor is it significant that the Court below also found a series of purported factual differences among the relevant Explorers or tires. As described above, most of these purported factual differences were simply irrelevant to Petitioners' claims. Part of the Court of Appeals' failure to undertake the examination required by the Rule, and by the decisions of other Circuits, was that it did not even bother to examine the elements of the asserted causes of action in order to determine the relevance of the claimed factual differences. Further, to the extent the differences were listed because the Court thought they related to damages, see Pet. App. 9a-10a, "the Advisory Committee Notes expressly state" – and courts have ordinarily found, see, e.g., *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F. 3d 124, 139-140 (2d Cir. 2001), cert. denied, 122 S. Ct. 2382 (2002) – "that . . . needed proof of damages will not preclude a finding of predominance." 1 Newberg and Conte, *Newberg on Class Actions*, 4-91-4-92. And, in any event, as the district court found but the Court of Appeals failed to consider, even relevant factual differences may be dealt with by the subclassing procedure set out in Fed. R. Civ. P. 23(c)(4). See also id. at 4-91-4-97 (describing procedures for resolving individual damages issues).

enrichment "mean excess compensation," Pet. App. 6a, that "Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone." Id. 11a.

The Court of Appeals' approach turns Rule 23's superiority requirement on its head. To begin with, it presupposes that federal courts have been authorized by the Rule to determine whether adjudication of claims recognized by state law – here the consumer claims raised by Petitioners – would be "superior" to their *non*-adjudication, rather than whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(a). As this Court has long recognized, Rule 23 is not about whether claims should proceed, but about how.[12] Nor, of course, as Justice Thomas wrote for the Court just last Term, is a federal court free to bend the Rules of Civil Procedure because of its views about the merits of one or another cause of action.[13]

In its approach, the Seventh Circuit has not only flouted the very language of the Rule, it has accreted to itself in violation of fundamental principles of federalism the power to judge the wisdom of state lawmakers in creating various causes of action.

The Court hypothesized an economic model of law under

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[12]See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (Rule 23 does not give courts "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

[13] See *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 999 (2002) (courts are not free to ignore Fed. R. Civ. P. 8(a) and impose a heightened pleading requirement in employment discrimination cases even to weed out "unsubstantiated suits"; any different result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (internal quotation marks and citation omitted).

which warranty, consumer protection and unjust enrichment claims would, in the face of the availability of tort recovery for those suffering physical injury or death from defective products, "overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects." See Pet. App. 6a and n. 1. It then posited that "most states" would follow its "tort only" approach because "tort law fully compensates those who are physically injured, [so] any recoveries by those whose products function properly mean excess compensation." Id. 7a.

That is obviously wrong. Whatever the merits of the Court's theoretical approach, it decidedly does not describe the law of *any* state.

To give just the most obvious example, there is no state in the Union that would deny consumers a contractual claim for breach of warranty because of the absence of physical harm. To the contrary, under § 2-314 of the Uniform Commercial Code, a consumer may recover under an implied warranty of merchantability if goods prove not "fit for the ordinary purposes for which such goods are used." See UCC §2-314 ("Implied Warranty: Usage of Trade"). *Every* state in the Union has adopted Article 2 of the UCC, with the sole exception of Louisiana, which has adopted the same protections statutorily. *See* La. Civ. Code Ann. art §§ 2524, 2475. Nor do state consumer protection laws require an allegation of physical – as opposed to economic – injury.

For example, in overturning dismissal of "no-injury" consumer claims under Texas and Florida law, Fifth Circuit Judge Edith Jones recently reaffirmed the well-established nature of such recovery regardless of the existence of an allegation of physical harm:

> "[B]enefit of the bargain" is a standard method for measuring damages in fraudulent representation cases and certain contract cases. The benefit of the bargain measure of damages is neither novel nor exotic. A simple example . . . makes the common-sense nature

> of benefit of the bargain damages clear: if a man buys what is represented to him as an 18k gold ring, but later discovers that the ring is merely 10k gold, he is entitled to the difference between the 18k ring that he bargained for and the 10k ring that he received.

See, e.g., *Coghlan v. Wellcraft Marine Corporations*, 240 F.3d 449, 452 (5th Cir. 2001) (footnote omitted) (upholding benefit of bargain causes of action for uninjured purchasers of purportedly all-fiberglass boat actually made of wood encased in fiberglass).

Given this rather obvious feature of American law, it should come as little surprise that none of the cases cited by the Court of Appeals for the proposition that "most states would not entertain the sort of theory that plaintiffs press," supported that assertion, most of them being either tort cases or cases in which allegations or evidence were insufficient. Indeed, one of them explicitly asserted the *opposite* of the proposition for which the Seventh Circuit cited it.[14]

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[14]See *Ford Motor Co. v. Rice*, 726 So. 2d 626, 627, 631 (Ala. 1998) ("[T]his Court has often allowed a plaintiff to recover damages under a fraudulent-inducement theory for a purely economic loss to a product itself based upon value that is indicated by a seller's representations but not actually received, even where the product was in fact working properly."). The other Court of Appeals and highest state court decisions cited by the Court below, none of which makes the point for which they were cited, were: *Briehl v. General Motors Corp.*, 172 F.3d 623, 628-629 (8th Cir. 1999) (dismissing warranty claim for loss of resale value for failure adequately to allege damages where plaintiffs neither alleged that they had resold their vehicles nor by what amount they were damaged by the alleged defect); *Angus v. Shiley*, Inc., 989 F.2d 142, 147-48 (3d Cir. 1993) (refusing to recognize an action for infliction of emotional distress where no allegation of defect had been pleaded); *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (finding insufficient evidence of defect and suggesting in dictum that the court would have "serious concerns" about an action for fear that a defective product will fail); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir. 1989), cert. denied, 495 U.S. 910 (1990) (interpreting implied warranty of merchantability to hold that well-functioning GM diesel cars, said to

Nor, indeed, is there any substance to the economic model upon which the Seventh Circuit's dramatic recasting of state law rests. Were the model sound, the resale value of Explorers, for example, would have been unaffected by the wide publicity of the asserted defects. Under the model, potential buyers would have been indifferent about purchasing a potentially lethal vehicle since, should the product fail, they could expect recovery for injury or death through the tort system. As set forth in the Complaint, however, the real world treats dangerous products quite differently. The value of the vehicles dropped precisely because potential used car buyers are not indifferent between having a safe vehicle in which they will remain uninjured, and having a defective one in which they risk injury but with the expectation of a tort recovery.

More fundamentally, though, the Seventh Circuit's judgment about the wisdom of providing these causes of action is irrelevant. Whether state law in fact overdeters wrongdoing, whether Judge Easterbrook would consider it wise to permit warranty, unjust enrichment or consumer protection claims when state law already provides for recovery for injury in tort, it is incontrovertible that states *do* provide such causes of action for purchasers of defective products who have not (or not yet) been physically injured, to compensate them for their financial loss.

To permit the Court of Appeals to utilize the superiority requirement of Rule 23 to override the judgment of state lawmakers creating these causes of action, and, based upon its own assessment of their desirability, to prevent such suits from going forward, violates basic principles at the heart of our system of federalism. Indeed, it violates one of the most

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have lost resale value because of the "poor reputation" of diesel cars resulting from defects in other GM diesel cars, were "fit for the ordinary purposes for which" they were sold); and *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187,192 (Ky. 1994) (negligence claim in tort cannot be brought before the conduct causes injury that produces loss or damage).

fundamental of those principles, that announced in *Erie v. Tompkins*, 304 U.S. 64 (1938).

Erie held that under the Constitution there was no federal "power to declare substantive rules of common law applicable in a State." Id. at 78.

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Id. at 78-79 (internal quotation marks and citation omitted). As Justice Holmes said in language quoted in *Erie*, "the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." Id. at 79 (brackets in original).

In determining that it would be best if plaintiffs were unable to receive redress under causes of action recognized in state law, the Seventh Circuit has violated precisely the principle enshrined in *Erie*.[15] In doing so, the ruling below conflicts with all Circuits that have certified national consumer classes based on faithful renditions of the substantive laws of the States. See, *e.g.*, *Hanlon*, 150 F.3d 1011 (9th Cir. 1998); *In re Asbestos School Litigation*, 789 F.

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[15]It has also run afoul of the Magnuson-Moss Act, 15 U.S.C. §§ 2304(a) & 2308, on which jurisdiction in the district court was based, which specifically preserves state warranty law for actions brought into federal court. *See* S.Rep No. 151, 1st Sess. 21 (1973) ("It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code.").

2d 996 (3d Cir. 1986).

C. To Hold that Refusal to Certify is "Superior" Because it Will Not Permit Plaintiffs to Proceed with Their Small Value Claims Contravenes this Court's Teaching that the Primary Purpose of Rule 23(b)(3) is to Permit Aggregation and Prosecution of Such Claims and Conflicts with the Decisions of the Third, Fifth and Eleventh Circuits.

The Court's superiority analysis independently conflicts with the teaching of this Court and the decisions of the other Courts of Appeals because it uses the small value of each individual class member's claim as a basis for denying certification, rather than as the central reason for granting it.

The Court of Appeals concluded that a refusal to certify would be superior in this case because each class member's claim was so small in relation to the cost of litigation that, absent the class action device, these suits would not proceed. Having concluded that recovery in warranty, consumer protection or unjust enrichment would "overcompensate[] buyers and lead[] to excess precautions," Pet. App. 6a-7a n. 1, the Court held that "Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone." Id. 11a.

As this Court has stated: "The policy at the very core of the [23(b)(3)] class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem*, 521 U.S. at 617 (internal quotation marks and citation omitted).[16]

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[16]Indeed, as this Court has described, in the inquiry into the

Among other things, the Rule thus acts to ensure the "effective enforcement" of civil law. 1 Newberg and Conte, *Newberg on Class Actions* ("*Newberg*") 4-170 (3d ed. 1992). Thus, "if a comparative evaluation of other procedures reveals no other realistic probabilities, [the superiority requirement] of Rule 23(b)(3) is met." 7A Wright, Miller & Kane, Federal Practice and Procedure §1779 at 552 (2d ed. 1986).

The Seventh Circuit, though, took the small value of the claims, the fact that standing alone none of them "provide[s] the incentive for any individual to bring a solo action prosecuting his or her rights," *Amchem*, 521 U.S. at 617, and thus that they will likely not be litigated individually, as a basis for finding that a class action would *not* be superior to "other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

This conclusion conflicts with the approach taken, under this Court's instruction, by the other Circuit Courts of Appeals. The Third Circuit, for example, in upholding class certification, has found proper a superiority determination in which the district court "examined the relatively modest size of the individual claims in the aggregate, and concluded a class action presented the 'only rational avenue of redress for many class members.'" *Prudential*, 148 F. 3d at 316.

The Fifth Circuit has said "the most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit." *Allison v. Citgo Petroleum*, 151 F.3d 402, 420 (5th Cir. 1998); see also *Castano*, 84 F. 3d at 748 (same).

"nonexhaustive list of [four] factors," id. at 615, explicitly identified in the Rule as pertinent to the determination of predominance and superiority, the Advisory Committee anticipated that courts would consider the interests of the members of the class in controlling their own litigation. The archetypal case in which these interests would be, for "practical" purposes nonexistent, was one in which "the amounts at stake for individuals [are] so small that separate suits would be impracticable," Adv. Comm. Notes, 28 U.S.C., App. 698. See *Amchem*, 521 U.S. at 616.

Likewise the Eleventh Circuit has said that "the most compelling justification for a Rule 23(b)(3) class action" is "the possibility of negative value suits, see *Amchem*, 521 U.S. at 617." See *Rutstein v. Avis*, 211 F.3d 1228, 1241 (11th Cir. 2000), cert. denied, 532 U.S. 919 (2001). See also *Newberg* 4-166 n. 482 ("It seems settled that the Rule 23 policy in favor of providing a forum for small claimants is of primary importance in resolving the superiority issue."). As the leading treatise on class actions asserts, "when claims of class members are small . . . . a court will likely certify a class action as superior . . . because a class denial would result in no litigation at all." Id. at 4-163. The decision below "depart[s] from the unambiguous design of the superiority test by failing to analyze how the common claims of all class members can be adjudicated by a feasible method that is available as a practical matter." Id. at 4-108-4-109.

D. The Court's Conclusion About Efficiency Ignores the Language of the Rule, this Court's Teaching, and Conflicts with the Decisions of Other Circuits.

Finally, the court's approach to measuring the "efficien[cy]" with respect to which Rule 23(b)(3) requires class treatment to be superior conflicts with that of the other Courts of Appeals. "Efficient" as that word is used in the Rule refers to the efficient adjudication of the controversy at issue: It is about avoidance of duplication of effort, the conservation of judicial resources, the elimination of litigation costs, and the speedy resolution of the controversy. See, *e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F. 3d 768, 783 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("One of the paramount values in [class actions] is efficiency. Class certification enables courts to treat common claims together, obviating the need for repeated adjudications on the same issue."); see also, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting [every class member]

to be litigated in an economical fashion under Rule 23").

Here, by contrast, the Court of Appeals looked at efficiency as though that meant creation of a "market" in claims against Respondents, in which the settlement value of remaining claims could be assessed by reference to the range of judgments entered in already-adjudicated cases. See Pet. App. 12a. The Court of Appeals concluded that "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," Pet. App. 12a (citing *In re Rhone-Poulenc Rorer, Inc.* ("*Rhone-Poulenc*"), 51 F. 3d 1293, 1299 (7th Cir.), cert. denied, 516 U.S. 867 (1995)), was preferable to the class action certified by the district court. In this, the Court purported to rely on *Rhone-Poulenc* in which Judge Posner concluded that class actions for mass tort claims, at least where (unlike in this case) a substantial number of high value individual suits have been found to lack merit, can force defendants to settle for more than the claims would have been shown to be worth had they been brought separately.[17]

To begin with, the very vision of "efficiency" articulated by the Court below – and its implication for the meaning of "superiority" under the Rule – is at variance with the understanding of that concept embodied in Rule 23 and

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[17]In *Rhone-Poulenc*, individual plaintiffs had lost in 12 of 13 cases advancing claims similar to those before the court. See *Rhone-Poulenc*, 51 F. 3d at 1299 ("A notable feature of this case . . . is the demonstrated likelihood that the plaintiffs' claims . . . lack legal merit. This is the inference from the defendants' having won 92.3 percent (12/13) of the cases to have gone to judgment."). Recent scholarship by Warren F. Schwartz, a senior member of the law and economics movement, contests the claim of *Rhone Poulenc* that class certification results in unjustifiably large settlements. See Schwartz, "Long-Shot Class Actions: Toward A Normative Theory of Uncertainty," 8 Legal Theory 297, 308-310 (2002) (finding Judge Posner's reasoning "unpersuasive" and concluding that "careful economic analysis" reveals "the weakness of the theoretical foundation for the hostility . . . expressed in the 'economic blackmail' characterization").

employed by the overwhelming majority of Courts of Appeals. See, *e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d at 1023 (upholding certification where "alternative methods of resolution" would "unnecessarily burden the judiciary"); *Sterling v. Velsicol Chem. Corp.*, 855 F. 2d 1188, 1196-1197 (6th Cir. 1988) (stating that "[t]he procedural device of a Rule 23(b)(3) class action was designed . . . to achieve the economies of time, effort, and expense," and affirming certification because "a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts."). Because the decision below conflicts with those decisions, it warrants review by this Court.

But there is more. For in extending *Rhone-Poulenc* to a circumstance in which there will *be* no "process of multiple trials," the decision below conflicts also with those of the Fifth Circuit, which has adopted *Rhone-Poulenc*,[18] because that Circuit understands *Rhone-Poulenc* to be applicable *only where, because of the size of the expected recovery, the prosecution of individual actions is economically feasible.* The Fifth Circuit applies *Rhone-Poulenc*'s efficiency analysis only when the class-action mechanism is not necessary for aggregating negative value suits. See *Castano*, 84 F. 3d at 748 (citing *Rhone-Poulenc* in support of the proposition that "the most compelling reason for finding superiority in a class action" is "the existence of a negative value suit").

Indeed, in teaching from which the Seventh Circuit has now departed, *Rhone-Poulenc* itself recognized that its analysis was applicable only where "it is entirely feasible to allow a final, authoritative determination of . . . liability . . . from a decentralized process of multiple trials, involving different juries, and different standards of liability in different jurisdictions." 51 F. 3d at 1299. In language not quoted by the Court below, Judge Posner wrote that the multiple-jury

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[18] See *Castano*, 84 F. 3d at 746-747.

approach "would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit, even though the aggregate stakes are very large and would repay the costs of a consolidated proceeding." 51 F. 3d at 1300. "The[] qualification[] [concerning feasibility is] important," he emphasized. 51 F. 3d at 1299. "In most class actions – and those the ones in which the rationale for the procedure is most compelling – individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation. That plainly is not the situation here." Id.

This critical distinction is crucial to the reasoning of *Rhone-Poulenc*; without it, the "market" approach cannot be squared with Rule 23(b)(3) – the primary goal of which is to assure access to the courts for small value claims – or with the decisions of the Fifth Circuit following *Rhone-Poulenc*.

With its decision below, the Seventh Circuit stretched beyond recognition the rationale of *Rhone-Poulenc* to those class actions where the hypothesized "decentralization" of claims, with the purported attendant benefit of the creation through multiple jury trials of "a series of decisions or settlements . . . produc[ing] an accurate evaluation of a subset of the claims . . . [so that] the others in that subset can be settled or resolved at an established price," Pet. App. 12a, will never occur, because the claims individually are worth such a small amount. In essence, it found on efficiency grounds that the *non*-adjudication of the claims was preferable to their adjudication using the class action device. The Rules do not license federal courts to make such sweeping assessments of the merits of claims in the name of "superiority" under Rule 23(b)(3). Compare *Hanlon*, 150 F. 3d at 1023 ("In most cases [at issue] litigation costs would dwarf potential recovery. . . . A fair examination of alternatives can only result in the apodictic conclusion that a class action is the clearly preferred procedure in this case.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 3, 2002

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 02-1437, 02-1438 & 02-1439

In the Matter of:

BRIDGESTONE/FIRESTONE, INC., TIRES PRODUCTS LIABILITY LITIGATION

Appeals of:

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION, and FORD MOTOR COMPANY

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 00-9373-C-B/S (MDL No. 1373)--Sarah Evans Barker, *Judge*.

ARGUED APRIL 17, 2002--DECIDED MAY 2, 2002

Before EASTERBROOK, MANION, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Firestone tires on Ford Explorer SUVs experienced an abnormally high failure rate during the late 1990s. In August 2000, while the National Highway Transportation Safety Administration was investigating, Firestone recalled and replaced some of those tires. Ford and Firestone replaced additional tires during 2001. Many suits have been filed as a result of injuries and deaths related to the tire failures. Other suits were filed by persons who own (or owned) Ford Explorers or Firestone tires that have so far performed properly; these persons seek compensation for the *risk* of failure, which may be reflected in diminished resale value of the vehicles and perhaps in mental stress. The Judicial Panel on Multidistrict Litigation transferred suits filed in, or removed to, federal court to the Southern District of Indiana for consolidated pretrial proceedings under 28 U.S.C. §1407(a). Once these have been completed, the cases must be returned to the originating districts for decision on the merits. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In an effort to prevent retransfer, counsel representing many of the plaintiffs filed a new consolidated suit in Indianapolis and asked the judge to certify it as a nationwide class action, which would make all other suits redundant. The district court obliged and certified two nationwide classes: the first includes everyone who owns, owned, leases, or leased a Ford Explorer of model year 1991 through 2001 anytime before the first recall, and the second includes all owners and lessees from 1990 until today of Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, or Wilderness tire models, or any other Firestone tire "substantially similar" to them. *In re Bridgestone/Firestone, Inc., Tire Products Liability Litigation*, 205 F.R.D. 503 (S.D. Ind. 2001); see also 155 F. Supp. 2d 1069 (S.D. Ind. 2001). More than 60 million tires and 3 million vehicles fit these definitions.

No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3). Yet state laws about theories such as those presented by our plaintiffs differ, and such differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes. See, e.g., *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). See also *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 746-47 (7th Cir. 2001). The district judge, well aware of this principle, recognized that uniform law would be essential to class certification. Because plaintiffs' claims rest on state law, the choice-of-law rules come from the state in which the federal court sits. See *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). The district judge concluded that Indiana law points to the headquarters of the defendants, because that is where the products are designed and the important decisions about disclosures and sales are made. Ford and Firestone engaged in conduct that was uniform across the nation, which the district court took to imply the appropriateness of uniform law. This ruling means that all claims by the Explorer class will be resolved under Michigan law and all claims by the tire class will be resolved under Tennessee law. According to the district court, other obstacles (such as the fact that the six named tire models represent 67 designs for different sizes and performance criteria, and that half of all 1996 and 1997 model Explorers came with Goodyear tires) are worth overcoming in light of the efficiency of class treatment. Nor did the district court deem it important that Firestone's tires were designed in Ohio, and many were manufactured outside Tennessee, as many of Ford's vehicles are manufactured outside Michigan.

Both Ford and Firestone petitioned for interlocutory review

under Fed. R. Civ. P. 23(f). We granted these requests because, as in *Rhone-Poulenc* and other cases (e.g., *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002)) the suit is exceedingly unlikely to be tried. Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims. Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f). See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Another function is permitting appellate review of important legal issues that otherwise might prove elusive. The district court's conclusion that one state's law would apply to claims by consumers throughout the country—not just those in Indiana, but also those in California, New Jersey, and Mississippi—is a novelty, and, if followed, would be of considerable import to other suits. Our review of this choice-of-law question is plenary, so we start there.

Indiana is a *lex loci delicti* state: in all but exceptional cases it applies the law of the place where harm occurred. See *Hubbard Manufacturing Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Those class members who suffered injury or death as a result of defects were harmed in the states where the tires failed. As a practical matter, these class members can be ignored; they are sure to opt out and litigate independently. These classes therefore effectively include only those consumers whose loss (if any) is financial rather than physical: it is the class of persons whose tires did *not* fail, whose vehicles did *not* roll over. Many class members face no future threat of failure either, because about 30 million tires were recalled and replaced, while other tires have been used up and discarded. Financial loss (if any, a qualification we will not repeat) was suffered in the places where the vehicles

and tires were purchased at excessive prices or resold at depressed prices. Those injuries occurred in all 50 states, the District of Columbia, Puerto Rico, and U.S. territories such as Guam. The *lex loci delicti* principle points to the places of these injuries, not the defendants' corporate headquarters, as the source of law.

Plaintiffs concede that until 1987 this would have been Indiana's approach. They contend, however, that *Hubbard* changed everything by holding that when the place of the injury "bears little connection to the legal action" a court may consider other factors, such as the place of the conduct causing the injury and the residence of the parties. It is conceivable, we suppose, that Indiana might think that a financial (or physical) injury to one of its residents, occurring within the state's borders, "bears little connection to the legal action", but the proof of that pudding is in the eating. Has Indiana since 1987 applied the law of a state where a product was designed, or promotional materials drafted, to a suit arising out of an injury in Indiana? As far as we can tell, the answer is no—not even once, and the state has had plenty of opportunities. Yet since 1987 both Indiana and this court have routinely applied Indiana law when injury caused by a defective product occurred in Indiana to Indiana residents. See, e.g., *Land v. Yamaha Motor Corp.*, 272 F.3d 514, 517 (7th Cir. 2001) (Indiana law); *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. App. 2002). Neither Indiana nor any other state has applied a uniform place-of-the- defendant's-headquarters rule to products-liability cases. It is not hard to devise an argument that such a uniform rule would be good on many dimensions, but that argument has not carried the day with state judges, and it is state law rather than a quest for efficiency in litigation (or in product design decisions) that controls.

"Ah, but this is not a products-liability case!" So plaintiffs respond to the conspicuous lack of support from state decisions.

And indeed it is not a products-liability suit, since all who suffered physical injury are bound to opt out. No injury, no tort, is an ingredient of every state's law. See, e.g., *Fogel v. Zell*, 221 F.3d 955, 960-62 (7th Cir. 2000); *In re Orthopedic Bone Screw Products Liability Litigation*, 193 F.3d 781, 789 (3d Cir. 1999); *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 757 N.E.2d 481 (2001). Plaintiffs describe the injury as financial rather than physical and seek to move the suit out of the tort domain and into that of contract (the vehicle was not the flawless one described and thus is not merchantable, a warranty theory) and consumer fraud (on the theory that selling products with undisclosed attributes, and thus worth less than represented, is fraudulent). It is not clear that this maneuver actually moves the locus from tort to contract. If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.[1]

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[1] Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. See *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 902 (7th Cir. 1994); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only $9,500 per widget—for the expected per-widget cost of injury is $500, and each buyer could have used the difference in price to purchase insurance (or to self-insure, bearing the risk in exchange for the lower price). On this theory the 990 uninjured buyers would collect a total of $495,000. The manufacturer's full outlay of $995,000 ($500,000 to the 10 injured buyers + $495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product's defect. This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system—$500 in damages to every buyer, or $50,000 in damages to every injured buyer—creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess

As a result, most states would not entertain the sort of theory that plaintiffs press. See, e.g., *Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (Mississippi, New York, Pennsylvania, and Texas law); *Angus v. Shiley, Inc.*, 989 F.2d 142, 147-48 (3d Cir. 1993) (Pennsylvania law); *Willett v. Baxter International, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (Louisiana law); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir. 1989) (South Carolina law); *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Ct. App. 1995); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 627, 631 (Ala. 1998); *Yu v. IBM Corp.*, 314 Ill. App. 3d 892, 732 N.E.2d 1173 (1st Dist. 2000); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994).

Obviously plaintiffs believe that Michigan and Tennessee are in the favorable minority; we need not decide. If recovery for breach of warranty or consumer fraud is possible, the injury is decidedly where the *consumer* is located, rather than where the seller maintains its headquarters. A contract for the sale of a car in Indiana is governed by Indiana law unless it contains a choice-of-law clause, and plaintiffs do not want to enforce any choice-of-law clause. Plaintiffs have not cited, and we could not find, any Indiana case applying any law other than Indiana's to warranty or fraud claims arising from consumer products designed (or contract terms written) out of state, unless a choice-of-law clause was involved. State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568-73 (1996). We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana would apply Korean law (no matter

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precautions.

what Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of cars equipped with Michelin tires. Indiana has consistently said that sales of products in Indiana must conform to Indiana's consumer-protection laws and its rules of contract law. See, e.g., *A.J.'s Automotive Sales, Inc. v. Freet*, 725 N.E.2d 955, 963 (Ind. App. 2000) (consumer-protection law); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513-14 (Ind. App. 1988) (contract law). It follows that Indiana's choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits.

Against all of this plaintiffs set a single decision: *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. App. 1997). This decision holds that the adequacy of services rendered by an accountant in Missouri to a business whose headquarters were in Missouri is governed by Missouri law, even when a suit is filed by unpaid lenders who live in Indiana. This is a straightforward application of *lex loci delicti*. The injury, if any, was suffered by the business, which hired and paid the accountant for professional services rendered directly to the client; those who dealt with the audited firm, such as the plaintiffs in *KPMG Peat Marwick*, suffer a derivative injury. Similarly a malpractice claim against a firm's lawyer is determined by the law of the state where the services are performed, for that state's law supplies the standard of performance and that is where the client normally would suffer injury. Investors may be able to step into a corporation's shoes and assert a derivative claim, and in some states (those that have rejected the *Ultramares* doctrine, see *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, J.)) investors may have a direct claim too; but because the firm remains the lawyer's or accountant's client one body of law must apply to this single transaction. Sales of a consumer product in 50 states do not lead to derivative

claims, and each sale is a separate transaction in the place of the sale. *KPMG Peat Marwick* accordingly has no bearing on consumers' suits against manufacturers of allegedly defective products.

Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, we add that this litigation is not manageable as a class action even on a statewide basis. About 20% of the Ford Explorers were shipped without Firestone tires. The Firestone tires supplied with the majority of the vehicles were recalled at different times;[2] they may well have differed in their propensity to fail, and this would require sub-subclassing among those owners of Ford Explorers with Firestone tires. Some of the vehicles were resold and others have not been; the resales may have reflected different discounts that could require vehicle-specific litigation. Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to underinflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may

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[2] On August 9, 2000, Firestone recalled its Radial ATX and Radial ATX II tires, but only in size P235/75R15, plus its Wilderness AT tires in size P235/75R15 (but only if they had been made in Decatur, Illinois). On January 2, 2001, Firestone recalled Wilderness LE tires, size P265/70R16, that had been manufactured the week of April 23, 2000, in Cuernavaca, Mexico. In February 2001 it recalled approximately 98,500 P205/55R16 Firehawk GTA-02 tires, most of which had been installed on Nissan Altima SE cars sold in the United States, Canada, Puerto Rico, and Guam. Finally, on May 22, 2001, Ford began a replacement program for all Firestone Wilderness AT tires in 15-inch, 16-inch, and 17-inch sizes. Other Firestone models, sizes, and plants were not involved in any recall program and these tires, though included in the class definition, may exhibit different (and lower) failure rates. The NHTSA was satisfied that these recalls removed all potentially defective tires from the road and did not require further action. Yet the tire class includes more than twice as many Firestone tires as were recalled.

have been higher in Arizona than in Alaska. Of those vehicles that have not yet been resold, some will be resold in the future (by which time the tire replacements may have alleviated or eliminated any discount) and some never will be resold. Owners who wring the last possible mile out of their vehicles receive everything they paid for and have claims that differ from owners who sold their Explorers to the second-hand market during the height of the publicity in 2000. Some owners drove their SUVs off the road over rugged terrain, while others never used the "sport" or "utility" features; these differences also affect resale prices.

Firestone's tires likewise exhibit variability; that's why fewer than half of those included in the tire class were recalled. The tire class includes many buyers who used Firestone tires on vehicles other than Ford Explorers, and who therefore were not advised to underinflate their tires. (Note that this description does not reflect any view of the merits; we are repeating rather than endorsing plaintiffs' contention that Ford counseled "underinflation.") The six trade names listed in the class certification order comprise 67 master tire specifications: "Firehawk ATX" tires, for example, come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly. Plaintiffs say that all 67 specifications had three particular shortcomings that led to excess failures. But whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and- for-all decision about whether all 60 million tires were defective, even if the law were uniform. There are other differences too, but the ones we have mentioned preclude any finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the

controversy." Fed. R. Civ. P. 23(b)(3). Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone.

The district judge did not doubt that differences within the class would lead to difficulties in managing the litigation. But the judge thought it better to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law. Efficiency is a vital goal in any legal system—but the vision of "efficiency" underlying this class certification is the model of the central planner. Plaintiffs share the premise of the ALI's *Complex Litigation Project* (1993), which devotes more than 700 pages to an analysis of means to consolidate litigation as quickly as possible, by which the authors mean, before multiple trials break out. The authors take as given the benefits of that step. Yet the benefits are elusive. The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. What *is* the law of Michigan, or Arkansas, or Guam, as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from state courts. (Ford asked us to certify legal questions to the Supreme Court of Michigan, to ensure that genuine state law was applied if Michigan's law were to govern the whole country; the plaintiffs stoutly resisted that proposal.) And if the law were clear, how would the facts (and thus the damages per plaintiff) be ascertained? One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident. Similarly Gosplan or another central planner *may* hit on the price of wheat, but that would be serendipity. Markets instead use diversified decisionmaking to supply and evaluate information. Thousands

of traders affect prices by their purchases and sales over the course of a crop year. This method looks "inefficient" from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. See Thomas Sowell, *Knowledge and Decisions* (1980). When courts think of efficiency, they should think of market models rather than central-planning models.

Our decision in *Rhone-Poulenc Rorer* made this point, and it is worth reiterating: only "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions" (51 F.3d at 1299) will yield the information needed for accurate evaluation of mass tort claims. Once a series of decisions or settlements has produced an accurate evaluation of a subset of the claims (say, 1995 Explorers in Arizona equipped with a particular tire specification) the others in that subset can be settled or resolved at an established price. See David Friedman, *More Justice for Less Money*, 39 J.L. & Econ. 211 (1996).

No matter what one makes of the decentralized approach as an original matter, it is hard to adopt the central- planner model without violence not only to Rule 23 but also to principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. See *BMW v. Gore*, 517 U.S. at 568-73; *Szabo* (reversing a nationwide warranty class certification); *Spence v. Glock, G.m.b.H.*, 227 F.3d 308 (5th Cir. 2000) (reversing a nationwide tort class certification); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 579 (1996); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DePaul L. Rev. 755, 781 (1995); Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault*

on State Sovereignty, 54 La. L. Rev. 1085 (1994). Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

The motion to certify questions of law to the Supreme Court of Michigan is denied as unnecessary in light of this opinion. The district court's order certifying two nationwide classes is

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re BRIDGESTONE/	)	
FIRESTONE, INC.	)	
TIRES PRODUCTS	)	IP 00-9373-C-B/S
LIABILITY LITIGATION	)	MDL No. 1373
	)	
THIS DOCUMENT	)	
RELATES TO ALL	)	
THE ACTIONS	)	(centralized before Hon. Sarah Evans Barker)

ORDER GRANTING MOTION FOR CLASS CERTIFICATION AND RULING ON RELATED MATTERS

INTRODUCTION

The Judicial Panel on Multidistrict Litigation ("MDL") transferred this action to this court, pursuant to 28 U.S.C. § 1407, on October 26, 2000. On January 2, 2001, Plaintiffs in a number of transferred cases filed their Master Complaint in this district against Ford Motor Company ("Ford"), Bridgestone/Firestone, Inc. ("Firestone"), and Bridgestone

Corporation ("Bridgestone"). One month later, Plaintiffs filed a Motion for Class Certification. For the reasons explained below, on November 28, 2001, we *GRANTED* in part and *DENIED* in part the Motion for Class Certification. Defendants filed Motions to Reconsider the November 28, 2001 Order. We now set forth fully our reasons for the class certification order, and in doing so, hereby *DENY* Defendants' Motions to Reconsider that ruling.[1] Also as explained below, Ford's Motion for Reconsideration of the Court's "Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint" ("July 27, 2001 Order") is *DENIED.* For similar reasons, Firestone's Motion for 28 U.S.C. § 1292 Certification of the July 27, 2001 Order is *DENIED.* This entry also explains our decision to *GRANT* Plaintiffs' Motion for Reconsideration of Ruling on the Scope of the TCPA[2] /MCPA[3] in July 27 Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint. Further, it is ordered that Plaintiffs submit for approval by January 16, 2002, the proposed notice to class members and tender therewith their proposed method and schedule for disseminating said notice.

PRELIMINARY MATTERS

A. Choice of Law Determination in the July 27, 2001 Order

In connection with the July 27, 2001 Order on Defendants' Motion to Dismiss, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 155 F. Supp.2d 1069 (S.D. Ind. 2001),

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[1] The classes are defined as set forth in the November 28, 2001 Order Certifying Classes.

[2] Tennessee Consumer Protection Act. Tenn. Code Ann. § 47-18-102 *et seq.*

[3] Michigan Consumer Protection Act. Mich. Comp. Laws § 445.901 *et seq.*

the Court determined that, under Indiana choice of law rules, Michigan law applies to the Class Plaintiffs' claims against Ford and Tennessee law applies to the Class Plaintiffs' claims against Firestone. Ford has asked us to reconsider that ruling or, in the alternative, to certify the choice of law question to the Indiana Supreme Court. Firestone has filed a motion requesting that we certify the ruling for an interlocutory appeal to the Seventh Circuit pursuant to 28 U.S.C. § 1292(b).

Firestone's Motion for 28 U.S.C. § 1292 Certification is easily resolved. It is clear that Firestone seeks review of the choice of law determination, not because of its impact on the Court's substantive rulings that certain claims alleged in the Master Complaint should not be dismissed,[4] but instead because of its impact on the propriety of class certification. The choice of law determination set forth in the July 27, 2001 Order is, in fact, an important element of the class certification analysis and is hereby incorporated by reference into our ruling on class certification. Accordingly, should the Seventh Circuit be inclined to review the choice of law determination, it will have the opportunity to do so as part of an appeal of the class certification ruling, which Defendants may seek pursuant to Federal Rule of Civil Procedure 23(f). Therefore, we deny Firestone's request for certification of the July 27, 2001 Order for interlocutory appeal.

Ford's Motion for Reconsideration of the Court's July 27, 2001 Order also is quickly addressed, inasmuch as it does little more than rehash arguments we considered and addressed the

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[4] Firestone gives no more than lip service to the notion that the Court would have dismissed additional claims of some of the named Plaintiffs had it applied the law of each Plaintiff's home state, rather than Tennessee law, to those claims, failing even to attempt to analyze how and to what extent that would be so. *See* Firestone's Memorandum of Support of Motion for 28 U.S.C. § 1292 Certification at 3.

first time around. A motion to reconsider under Rule 59 "is not a vehicle for rearguing previously rejected motions," *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001), and Ford's motion essentially does just that.[5] The only new argument made in Ford's motion to reconsider is its complaint that the Court's ruling "effectively declares erroneous all parallel rulings by Indiana's appellate courts." *See* Ford's Motion to Reconsider at 6-8. However, as Ford acknowledges, not one of the "parallel rulings" (in Indiana breach of warranty cases) it cites for the proposition that choice of law for contract-based claims is dictated by the place of purchase of an allegedly defective product contains any explicit choice of law analysis. Rather, Ford attempts to fashion binding precedent out of the fact that in the cases it cites "Indiana courts and the parties *instinctively*

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[5] In their challenge to the Court's choice of law determination in the July 27, 2001 Order, Defendants focus primarily on choice of law for purposes of the Class Plaintiffs' contract-based claims (warranty and unjust enrichment), which holdings the Court incorporates in this entry. Defendants, however, also have challenged the Court's choice of law ruling with respect to the Class Plaintiffs' tort claims, acknowledging that those claims (based on consumer protection statutes) were the subject of a motion to reconsider filed by Plaintiffs and, thus, remain at issue in this case. Because the Court is granting Plaintiffs' motion to reconsider portions of its July 27, 2001 Order relating to claims under the Michigan and Tennessee consumer protection acts, we address briefly here Defendants' arguments that the choice of law determination for tort claims was incorrect. As with their contract choice of law arguments, Defendants have done nothing more than re-hash (though perhaps more vehemently) the arguments they have already advanced. Moreover, Defendants' motions do not even acknowledge, let alone distinguish, the Indiana decisions upon which this Court relied in making its ruling, nor do they address the important distinction we drew in the July 27, 2001 Order between choice of law in this "no injury"/"no manifestation of defect" case and cases involving personal injury to the plaintiff. *See Bridgestone/Firestone*, 155 F. Supp.2d at 1081 n.9. In any event, we have examined this issue at length in connection with the July 27, 2001 Order and reaffirm the conclusions reached there.

applied the law of the place where the product was purchased and used." *Id.* at 8. We do not infer as much from the courts' silence in these cases. That these courts did not make a choice of law analysis is not surprising, in light of the fact that "[i]t is well established in Indiana that if the law of another state is not pleaded or no steps are taken to require the court to take judicial notice of that law ... the court will presume the law in that jurisdiction is substantially the same as the law in Indiana." *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 691 (Ind. 1986). Therefore, the courts of Indiana typically will apply Indiana law unless the parties raise a conflict of laws issue. And, given the general uniformity of warranty law, it is also not surprising that the parties rarely have any reason to urge the application of another state's laws.

Indeed, the weakness of Ford's contention that choice of law should be made with reference to the place where the product was "purchased and used" is apparent, because a product is not necessarily purchased and used in the same state. Ford concedes in a footnote that Defendants argued in the context of their motion to dismiss that the law of the state of each Plaintiff's residence should apply, but it now appears to argue that the law of the state in which each Plaintiff purchased the Tires[6] or Explorers should apply, explaining that "[s]ince consumers normally buy tires and vehicles at or near their place of residence, defendants intended the term 'residence' to be shorthand for an amalgam of these factors—the place of contracting to buy the tires and/or vehicle, the place of contract negotiations, the site of performance, and the location of the contract's subject matter." Ford's Motion to Reconsider at 10 n.11. Obviously, it would not be unusual for consumers who, for example, live in communities bordering two or more states regularly to purchase products outside their state of residence.

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[6] The term "Tires," as used in this entry, means those tires set forth in the Class definition contained in the Court's November 28, 2001 Order.

Ford does not explain why the states of purchase, rather than the states of Plaintiffs' residence, should apply. And what about the state in which the vehicle (and the Tires on it) was primarily used, which could be a different state altogether (or, perhaps for some Plaintiffs, numerous states)?

Ford also did not explain in its briefing on the motion to dismiss, and does not explain now, why it believes that the state in which each Plaintiff purchased his or her Explorer is more intimately connected to the facts relevant to this case than Michigan, the state in which countless relevant acts by Ford employees were undertaken over a period of many years. The closest Defendants come to such an explanation is their argument that Plaintiffs, as consumers, would not have expected Tennessee or Michigan law to apply to their claims, and indeed that such a thought would likely have "shocked" them. Supp. Memo in Opp. at 16. Fortunately even for the Defen-dants, courts generally do not decide legal issues based upon the emotional reactions of lay persons. The Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), does instruct that the expectation of the parties is an important consideration in determining whether the application of a particular state's law is so "arbitrary and unfair" that it exceeds constitutional limits. However, not surprisingly, Defendants cite no case in which the application of the law of the defendant's home state, where significant conduct relevant to the plaintiff's claim took place, was found to be unconstitutional.[7]

The remainder of Ford's arguments are addressed in the July

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[7] The application of Kansas law was found unconstitutional in *Shutts* as to many of the plaintiffs in a nationwide class action suit because those plaintiffs' claims had absolutely no connection to Kansas whatsoever—neither the plaintiff nor the defendant resided in Kansas, and no conduct relevant to the dispute took place in Kansas.

27, 2001 Order, *Bridgestone/Firestone*, 155 F. Supp.2d at 1078-85, and we decline Ford's request to reexamine those arguments now. We further deny Ford's request that we certify the choice of law question to the Indiana Supreme Court.

B. Choice of Law as Affected by the Evidentiary Submissions Made in the Class Certification Context

When we made our choice of law determination in the context of our July 27, 2001 Order, we took as true all of the Plaintiffs' allegations, including their factual allegations relevant to the choice of law determination. Consistent with the holding in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 348, we invited the parties to present any facts relevant to the choice of law analysis in the context of the class certification briefing and argument because, as *Szabo* makes clear, a trial court is required to resolve relevant factual disputes in ruling on a motion for class certification.[8] In response to the Court's invitation, Firestone submitted evidence as part of its opposition to the Plaintiffs' Motion for Class Certification which it contends contradicts the factual allegations made by the Plaintiffs regarding the choice of law issue.[9] Specifically, Firestone has submitted evidence that demonstrates the following:

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[8] *See* Order Setting Hearing dated September 7, 2001; Transcript of November 16, 2001 Hearing on Plaintiffs' Motion for Class Certification ("Transcript") at 8.

[9] Other than a passing reference by Ford to the fact that not all of its activities related to advertising took place in Michigan, Ford did not submit any evidence, either with its written submissions or at the class certification hearing, to suggest that its actions relevant to the Plaintiffs' claims took place somewhere other than Michigan.

1. Firestone's engineers perform their tire design work in Akron, Ohio, not Tennessee. Supp. Memo. at 12 (citing Wyant Dep. at 283; Lampe Dep. at 610);

2. Firestone's national advertising (which presumably is approved in Tennessee, although Firestone does not say) is limited; the majority of advertising is conducted "by Firestone's regional offices, local affiliated Firestone stores, and independent, unaffiliated tire dealerships and mass merchandisers" in states other than Tennessee. *Id.* at 13.

3. Warranty adjustment data was collected "in the field" by Firestone's regional offices around the nation. *Id.* at 13-14 (citing Ball Dep. at 86; Laubie Dep. at 66). Notably, however, Firestone fails to cite to Mr. Ball's testimony that this warranty adjustment data was sent to, and analyzed by, Firestone in Tennessee. Ball Dep. at 87. Firestone does not explain why the places adjustment data was collected, rather than the centralized place it was analyzed, is a significant factor.[10]

Firestone's evidence does demonstrate that not all of Firestone's conduct relevant to Plaintiffs' claims took place in Tennessee, and indeed that certain significant aspects of its conduct—the actual design of the Tires by Firestone's engineers—took place outside of Tennessee.[11] Even so, Firestone has not demonstrated

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[10] Firestone also points to the fact that the Tires were manufactured at various Firestone plants outside of Tennessee; however, because Plaintiffs do not assert that the Tires have a manufacturing defect, the place of manufacture is irrelevant to the choice of law analysis.

[11] We note that Firestone does not argue that the law of Ohio, where the design of the Tires took place, should apply to the Plaintiffs' claims against it.

that the preponderance of its relevant conduct took place somewhere other than Tennessee.

In making choice of law decisions in contract cases, Indiana courts " 'will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact.' " *Hubbard Mfg. Co., Inc. v. Greeson,* 515 N.E.2d 1071, 1073 (Ind. 1987) (quoting *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (1945)). This rule was first articulated by the Indiana Supreme Court in *Hughes,* in which the Court found persuasive the reasoning of the authors of a commonly-used casebook of the time, Harper and Taintor, *Cases on Conflict of Laws,* (1937):

> Many courts purport to find the most significant contact point, with respect to contractual transactions, at the place intended by both parties. It seems, rather, that these courts examine all the circumstances which could be supposed to have influenced the actions of the parties, and find the most intimate contact at that place which might be characterized as the center of gravity of the circumstances.
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> There is evident benefit in taking this accumulation of contact points as paramount, since then many difficult questions with respect to the identification of the place of contracting or the place of performance will be avoided; and, furthermore, this result harmonizes with a sense of appropriateness: that is to say, *it is appropriate that a transaction be governed by the law of the state with which it is most closely in contact, not because of the quasi-localization of a legal concept-place of contracting, place of performance, intention of the*

> *parties—but because of the closeness of factual contacts between that state and the significant acts of the parties.*

Hughes, 63 N.E.2d at 423 (emphasis added). In other words, the Indiana Supreme Court rejected a mechanical "place of breach" rule in favor of a more flexible rule that looks to the law of the state in which the "significant acts of the parties" took place. *See Greeson*, 515 N.E.2d at 1073 (so characterizing the *Hughes* holding). Subsequent Indiana cases have considered the following factors, set forth in the Restatement (Second) of Conflict of Laws, as among those relevant to this analysis: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties. *See, e.g., Travelers Indemnity Co. v. Summit Corp. of America*, 715 N.E.2d 926, 931 (Ind. Ct. App. 1999); *Eby v. York-Division, Borg- Warner*, 455 N.E.2d 623, 626 (Ind. Ct. App. 1983) (both citing *Restatement (Second) of Conflict of Laws* § 188 (1971)).

Both Defendants cite the Restatement factors and insist that the law of the state in which each Plaintiff purchased Defendants' product(s) must apply to that Plaintiff's claims. However, Defendants' analysis is flawed in several respects. First, Defendants argue that the relevant contract is the purchase of the Explorer or Tires, and therefore the place of performance was the place of the purchase. As to the breach of warranty claims, this is simply incorrect. The relevant contract is the warranty, and because Plaintiffs presumably could have sought performance under the warranty in any state upon discovering a defect, the place of performance was unknown at the time of the purchase. The place of performance is "assigned little weight when, as here, at the time of contracting the place of performance is either uncertain or unknown." *Employers Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1024

(Ind.Ct.App.1999) (citing *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 291 (Ind. Ct. App. 1997) and *Restatement (Second) of Conflict of Laws* § 188 cmt. e (1971)). The Defendants also argue that the place of negotiation is relevant, which ignores the practical reality that the warranties at issue were not negotiated at all, but rather either were standard written warranties, the terms of which were determined entirely by the Defendants, or were, in the case of the implied warranty of merchantability, simply implied by law. Therefore, the place of negotiation is not a relevant factor in this case. We also accord little weight to the location of the contract's subject matter in this case, in that both the Explorer and the Tires are, by their very nature, designed to be mobile. Further, "standing alone, the place of contracting is a relatively insignificant contact." *Travelers Indem. Co.*, 715 N.E.2d at 932 (quoting *Restatement (Second) of Conflicts of Laws* § 188 cmt. e (1971)).

The remaining two *Restatement* factors are the plaintiff's domicile and the defendant's domicile. Substantial (although, as Firestone has demonstrated, not all) conduct relevant to Plaintiffs' claims took place at each Defendant's principal place of business, while Defendants have pointed to no corresponding substantial relevant conduct that took place in Plaintiffs' home states. Accordingly, having considered all the evidence presented by the parties, we reaffirm our prior determination that Michigan and Tennessee are the states with the most intimate contacts with the facts relevant to Plaintiffs' claims, and therefore, under Indiana choice of law rules, the law of Michigan must be applied to the claims against Ford and the law of Tennessee must be applied to the claims against Firestone.

C. Ford's Motion to Reconsider Rejection of Its "No Injury" Argument

In its motion to reconsider the July 27, 2001 Order, Ford

takes issue with the Court's determination that, unlike their tort claims, Plaintiffs' breach of warranty and unjust enrichment claims were not subject to dismissal based upon the fact that Plaintiffs suffered no manifest injury as a result of the defects they allege. Our July 27, 2001 Order fully addresses Ford's arguments on this issue, and we deny Ford's request to reexamine those arguments. We also decline Ford's invitation to certify the question to the Michigan Supreme Court.

D. Plaintiffs' Motion to Reconsider Availability of Nationwide Class Actions Under the TCPA and MCPA

In the July 27, 2001 Order, the Court dismissed Plaintiffs' Tenth Claim for Relief to the extent Plaintiffs asserted such claims against Firestone and Ford "for all others similarly situated."[12] We held that "Plaintiffs cannot maintain a class action under either the TCPA or MCPA" because (1) "[b]y its terms, the TCPA does not provide for class actions," and (2) class actions may be brought under the MCPA only on behalf of "Michigan residents and injurees." *Bridgestone/Firestone*, 155 F. Supp.2d at 1105. Plaintiffs ask us to reconsider this ruling on the grounds that the TCPA actually does permit class actions and that Federal Rule of Civil Procedure 23 trumps any state law purporting to limit class actions in federal court based on state law. Plaintiffs' Motion to Reconsider at 3.

This situation presents a classic case for reconsideration. Reconsideration is appropriate where the court "has made a decision outside the adversarial issues presented to the Court by the parties." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*,

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[12] In our earlier ruling, we allowed that Plaintiffs may be able to maintain their consumer protection act claims on an individual basis, after alleging reliance, but not as a class action. The aspect of our ruling related to reliance is addressed in the section of this entry concerning predominance.

906 F.2d 1185, 1191 (7th Cir. 1990). Due to the parties' opposing positions on choice of law, Defendants did not raise the issue of unavailability of classwide relief under the TCPA or the MCPA until their reply brief. Hence, Plaintiffs did not squarely address this issue in their argument in opposition to the motion to dismiss. Absent adversarial briefing on this problem, certain key cases were not called to our attention. We examine our prior ruling in light of these cases.

In *Bridgestone/Firestone*, 155 F. Supp.2d at 1105, we addressed the meaning of the terms of the TCPA. Specifically, the statute permits "[a]ny person who suffers an ascertainable loss of money or property ... as a result of the use or employment ... of an unfair or deceptive act or practice ... [to] bring an action *individually* to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) (emphasis added). Based on this language, we accepted Defendant Firestone's argument that class actions are not permitted under the TCPA. *Bridgestone/Firestone*, 155 F. Supp.2d at 1105. However, in requesting reconsideration, Plaintiffs make two points. First, Tennessee state courts have certified classes in cases involving claims under the TCPA. *See Carter v. First Tennessee Bank*, No. 3894 (Fayette Cty. Cir. Ct., Jan. 8, 2001) (certifying a class for TCPA and other claims); *Robinson v. EMI Music Dist.*, 1996 WL 495551 (Tenn. Cir. Ct. 1996) (same); *Crump v. WorldCom, Inc.*, 128 F. Supp.2d 549, 552 (W.D. Tenn. 2001) (remanding case involving TCPA claims to state court, where class previously had been conditionally certified). Defendant Firestone correctly notes that none of these cases has specifically addressed the issue raised by the language of the TCPA authorizing individual actions. Opp. at 10. However, we find that the courts in *Carter*, *Robinson*, and *Crump* have at least implicitly, and necessarily, interpreted the TCPA not to preclude class actions. This point brings us to the second matter raised in Plaintiffs' briefs: in general, we must defer to a state court's interpretation of the state's statute.

Williams v. Duckworth, 738 F.2d 828, 833 (7th Cir. 1984). We acknowledge the possibility that Tennessee lower courts might have misinterpreted the state statute,[13] but we are unwilling to contradict their decisions regarding the TCPA, now that we know of these cases, in favor of our prior finding. *See U.S. ex rel. Burnett v. Illinois*, 619 F.2d 668, 671 (7th Cir. 1980) ("Errors in the interpretation of state authority are for the state supreme court to correct."). Hence, we find that based on interpretations by Tennessee courts, nothing in the TCPA prohibits this court from certifying a class of consumer protection claimants.

We turn next to address Plaintiffs' arguments concerning our prior decision that the MCPA prohibits nationwide class actions. The MCPA states that "[a] person who suffers a loss as a result of a violation of this act may bring a class action *on behalf of persons residing or injured in this state* for the actual damages caused by [the acts prohibited]." Mich. Comp. Laws § 445.911(3) (emphasis added). In our earlier ruling, we noted that none of the named Plaintiffs are from Michigan and that Plaintiffs did not argue that all members of the proposed classes were either injured in Michigan or residents of Michigan. On this basis, in light of the statutory language, we concluded that Plaintiffs could not maintain a nationwide class. Defendant Ford urges the Court to adhere to its earlier ruling. Plaintiffs, in their motion to reconsider, argue that *Erie* principles require the application of Federal Rule of Civil Procedure 23 in federal court, rather than the use of any state law attempting to limit state-law based class actions. Plaintiffs' Motion to Reconsider at

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[13] We note, in defense of the Tennessee courts' decisions to certify classes, that the term "individual" in statutory language often is not interpreted to exclude the possibility of class certification. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable to them.").

3 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). We consider Plaintiffs' motion to be well taken.

The shorthand of *Erie* is that federal courts sitting in diversity cases "apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). The difficulty in using the *Erie* formula is in determining whether a disputed rule is "substantive" or "procedural." Because the federal law at issue here is a Federal Rule of Civil Procedure, our task in applying *Erie* principles to the case before us is slightly different. In *Hanna*, the Supreme Court directed:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

380 U.S. at 471. Therefore, first we must determine whether the scope of Rule 23 is sufficiently broad to control the issue before us. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980); *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 4-5 (1987). If so, and if the Federal Rule is consistent with the Rules Enabling Act and the Constitution, then we must apply Rule 23. *Hanna*, 380 U.S. at 471.

We find that Rule 23 does cover the situation before us. As we noted in our earlier ruling, Plaintiffs may be able to maintain individual consumer protection claims against Ford under the MCPA, regardless of their states of residence or injury. *In re Bridgestone/Firestone*, 155 F. Supp.2d at 1106 (citing *Nesbitt v. American Community Mutual Ins. Co.*, 600 N.W.2d 427, 433

(Mich. Ct. App. 1999) (permitting non-resident plaintiff to sue his deceased wife's Michigan health insurer under MCPA)). Hence, Plaintiffs have the substantive right to sue Ford for its alleged violations of the consumer protection act. The question before us now is *how* these Plaintiffs can proceed in pursuing relief. Federal Rule 23 covers this issue. It sets forth numerous standards for determining whether a class action is maintainable. If Plaintiffs satisfy these standards, a question examined elsewhere in this opinion, then they can pursue relief as a group. If not, then each claimant is left with the procedural remedy of suing on an individual basis.

Defendant Ford argues that the MCPA's restrictions on who may sue under the Act's class litigation provisions are substantive and that, therefore, Federal Rule 23, a procedural apparatus, does not control the issue before the court. Opp. to Reconsideration at 4. Ford's argument is based on the refinement of *Hanna* contained in *Burlington Northern* and *Walker*. In *Burlington Northern*, the Supreme Court required that the Federal Rule in question be "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for operation of that law." 480 U.S. at 4-5 (quoting *Walker*, 446 U.S. at 749-50). Ford is wrong on two grounds, however, to conclude on the basis of *Burlington Northern* and *Walker*, that "nothing in [Rule 23] sets up a 'direct collision' with the MCPA's substantive provisions limiting a person's right to bring consumer act claims to a narrow class of individuals." Opp. to Reconsideration at 4.

First, we do not find that the MCPA's limit of consumer actions to persons residing or injured in Michigan is substantive. The right to sue for damages caused by representing that a good is new when it is not, by representing that a good has sponsorship that it does not have, or by failing to reveal a material fact about a good is the substantive right granted by the MCPA. *See* Mich. Comp. Laws § 445.903(c)-(d), (s). Whether

that substantive right can be vindicated through a class action or whether it must be pursued individually is a procedural question.[14] In *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345-46 (7th Cir. 1997), the Seventh Circuit ruled that the 30-day notice required before commencing a class action under a provision of the Wisconsin consumer protection act must give way to Rule 23, which does not contain a notice provision. The court in *Mace* ruled that the statutory designation of class action status to persons providing 30-days' notice to the defendant did not grant or deny a substantive right, but rather set forth a requirement as to how that substantive right was to be effectuated. *Id.* at 346. Likewise, here, the statutory designation of class action status to persons injured or residing in Michigan does not grant or deny a substantive right, but explains how the substantive right to sue for consumer protection violations is to be exercised. Ford argues that whether one can sue on a representative basis (rather than whether one can sue at all) is a substantive right. *See* Opp. to Reconsideration at 3 n.2. Ford's citation to *Mace* on this point is unavailing for the reasons just explained. Ford also cites *Kreindler v. Marx,* 85 F.R.D. 612, 616 (N.D. Ill. 1979), in support of the proposition that whether class action status is available is a substantive right. *Kreindler* cannot do the labor Ford asks of it. In *Kreindler,* the district court ruled that plaintiff's status and standing as a shareholder to bring a derivative suit was a matter of state substantive law, not a question of Federal Rule 23.1. *Id.* However, status as a shareholder is the essence of what it means to bring a suit on behalf of the corporation to enforce the corporation's rights. For instance, a person who is not a shareholder does not suffer the type of injury a derivative suit addresses. In contrast, when a

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[14] Apparently, Tennessee courts view this issue similarly. For instance, in *Carter,* the court seems to have accepted the proposition that the named plaintiffs had a cause of action under the TCPA. The court then looked only to Tennessee Rule of Civil Procedure 23 to determine if the procedural requirements of class certification had been met.

consumer does suffer the injury a consumer protection statute addresses, Rule 23 establishes the mechanism through which this consumer can bring an action in conjunction with other consumers who allegedly suffered injury as a result of the same conduct.

Second, contrary to Ford's argument, there is a direct collision between Rule 23 and § 445.911 of the MCPA. Although the court in *United States v. Dentsply Int'l, Inc.*, 2001 WL 624807, at *16 (D. Del. March 30, 2001), reached the conclusion advanced by Ford, reasoning that "Rule 23 ... governs the manner of determining whether class certification is appropriate in federal courts; § 901(b) [a New York law barring class actions to recover a penalty] establishes a bar to certain claims being considered for class action treatment on a threshold level," we do not find this reasoning persuasive. Rule 23 does indeed set up the criteria for determining whether to certify a class. It instructs courts to look at numerosity, commonality of issues, and adequacy of representation, among other factors. Fed.R.Civ.P. 23. However, the MCPA, insofar as it attempts to limit class actions to those residing or injured in Michigan, does not "bar" certain claims from being considered for class action status. Instead, it adds another criterion—injury or residence in Michigan—not contemplated by Rule 23's requirements of numerosity or commonality of issues. *See Califano*, 442 U.S. at 702 ("Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule."). In fact, this criterion conflicts with Rule 23, and in such situations, the federal rule controls. *See Hanna*, 380 U.S. at 465; *Burlington Northern*, 480 U.S. at 7 (rendering ineffective state rule severely limiting discretion provided for by Federal Rules).[15]

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[15] Defendant also argues that applying Rule 23 in this situation would transgress the Rules Enabling Act by creating a substantive right denied by

For all of these reasons, the Court, having again considered its July 27, 2001 Order, now determines that nationwide class actions can be maintained to assert claims under the MCPA and TCPA.

CLASS CERTIFICATION IS APPROPRIATE

On February 2, 2001, Plaintiffs filed a Motion for Class Certification, and the parties briefed the issue. On July 27, 2001, the Court ruled on Defendants' Motion to Dismiss. *Bridgestone/Firestone, Inc.*, 155 F. Supp.2d 1069. Because this ruling eliminated certain causes of action, we invited the parties to engage in supplemental briefing, which they have now completed. On November 16, 2001, a hearing on class certification was conducted at which the parties presented arguments and evidence in support of their respective positions. In our ruling dated November 28, 2001, we granted class certification in part and denied in part Plaintiffs' motion. The order now being issued reaffirms that ruling and explains the basis for our conclusion to certify an Explorer Class and Sub-Class and a Tire Class. We also set forth our reasons for denying Plaintiffs' motion to certify a class of persons alleging property damage.

A. Standard for Class Certification

A class is appropriate for certification only if it meets the four prerequisites to a class action set out in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed.R.Civ.P. 23(a). Once this hurdle is cleared, the court also must ensure that the proposed class satisfies one of

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Michigan law. Opp. to Reconsideration at 7. For the reasons explained above, Rule 23 does not create a substantive right; it merely provides a means of effectuating the right granted by the MCPA.

the three standards established by Rule 23(b). Here, Plaintiffs argue that the class can be certified under Rule 23(b)(3) or as a hybrid "23(b)(2)/(b)(3)" class action. Supplemental Memo. in Support at 1. Rule 23(b)(3) examines whether common questions of law or fact predominate over questions affecting individual members of the class and whether a class action is a superior method for resolving the controversy. Rule 23(b)(2) authorizes class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

As mentioned earlier, *Szabo*, 249 F.3d at 675-76, controls the degree to which we examine the evidence submitted on the issue of class certification. In *Szabo*, the Seventh Circuit chastised the district court for accepting the allegations of the complaint as true when deciding whether to certify a class. 249 F.3d at 675 ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."). Instead, the Court of Appeals directed that a district court must "make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. We understand our responsibility to be to receive evidence and resolve disputes pertaining to class certification even when that means "mak[ing] a preliminary inquiry into the merits." *Id.* With *Szabo* in mind, we begin by examining the four criteria identified in Rule 23(a).

B. Requirements of Rule 23(a)[16]

(1) Numerosity

A proposed class must be so large that joinder of all parties would be impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs claim that the proposed Tire Class and Explorer Class each consists of more than one million persons throughout the United States. Memo. in Support at 10. Defendants do not contest numerosity, and no evidence has been presented calling into question Plaintiffs' estimate of class size. Hence, the Court finds that the numerosity requirement for class certification has been met.

(2) Commonality

To maintain a class action, there must be questions of law or fact common to the class. Fed.R.Civ.P. 23(a)(2). The commonality requirement is ordinarily satisfied when there is "a common nucleus of operative facts." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). Not all questions of law or fact need to be identical as long as there are common questions at the heart of the case. *Hubler Chevrolet, Inc. v. General Motors Corp.,* 193 F.R.D. 574, 577 (S.D. Ind. 2000) (citations omitted). Plaintiffs maintain that Defendants' conduct in designing, warranting, advertising, and selling unreasonably dangerous products to customers, while engaging in a common plan to conceal these dangers, constitutes a common question of law or fact. A focus on the defendants' conduct often satisfies the commonality requirement. *Cf. Service Spring, Inc. v. Cambria*

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[16] The briefing of the parties reveals that there are no real disputes among them as to Plaintiffs' ability to make these showings. Lacking a formal stipulation among them, however, and to the extent there are differing views, we address each requirement here and in the context of our Rule 23(b) ruling.

Spring Co., 1984 WL 2925, at *2 (N.D. Ill. Jan.6, 1984) (defendants' alleged conspiracy and concealment of conspiracy satisfied commonality requirement in antitrust case). Furthermore, Defendants contest this issue only tangentially in their argument against predominance. Opp. at 11. For these reasons, we conclude that Plaintiffs satisfy the commonality requirement of Rule 23(a)(2)

(3) Typicality

Rule 23(a) further requires that "the claims ... of the representative parties are typical of the claims ... of the class." Fed.R.Civ.P. 23(a)(3). This requirement is satisfied where the named plaintiffs' claims "arise[ ] from the same ... practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983) (citation omitted). Here also, Defendants challenge typicality primarily as part of their attack on predominance. Named Plaintiffs for the Tire Class, like all members of the Tire Class, base their claims on the same set of activities engaged in by Firestone; namely the design, marketing, and distribution of faulty Tires. Likewise, the named Explorer Plaintiffs owned or leased allegedly defective vehicles at allegedly inflated prices, as did the members of the proposed class. Therefore, we find that the representatives' claims are "substantially similar," thereby satisfying the typicality requirement. *See Ruiz v. Stewart Associates, Inc.*, 171 F.R.D. 238, 242 (N.D. Ill. 1997) (citation omitted).

(4) Adequacy of Representation

The named representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The adequacy standard involves two elements: one relates to the adequacy of the named plaintiffs' representation of the class and

requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977). Defendants, for good reason, we think, do not challenge the adequacy of the proposed class counsel's representation of the class. In our December 8, 2000 Order on Plaintiffs' Management Structure and Various Case Management Matters, we appointed these lawyers, after consideration of their qualifications, to the Plaintiffs' Executive Committee and to six topic-centered subcommittees. Accordingly, our analysis focuses on the first of the two factors.

Rule 23(a)(4) prohibits conflicts between proposed class representatives and members of the class in order to ensure that "the named plaintiff[s'] claim[s] and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997). Courts addressing adequacy must "assess the likelihood that a conflict of interest may exist." *Susman*, 561 F.2d at 94. Defendants maintain that "conflicts abound" between the class representatives and the members of the proposed class. Opp. at 93. Specifically, they argue that the proposed classes create the following types of conflicts among putative class members: (1) class members who own recalled Tires have different interests from those who own Tires that have not been recalled; (2) class representatives and class counsel may undertake and have undertaken strategies to enhance the likelihood of class certification that may not be favorable to some members; (3) the claims of proposed class members who have had problems with their Tires or Explorers will be diluted by the presence of members who have not; (4) some Explorer diminution class members will have stronger claims than others; and (5) those who own the Tires but not Explorers (and vice versa) will have varying interests as to

which Defendant is saddled with the blame. Opp. at 93-95.

We do not find Defendants' examples of potential conflicts to be so threatening as to preclude class certification. For instance, Defendants argue that there is a conflict between those with Tires subject to the August 9 recall as compared to those who own Tires subject to the September 1 advisory as compared to those who own Tires not subject to either remedial action. Opp. at 93. In support of their argument, Defendants cite deposition testimony from two named Plaintiffs. *Id.* One plaintiff, James Conley Stone, Jr., stated that "[o]nly people that ... have the recall tires, I believe, should be a part of the lawsuit." Stone Dep. at 27. Another plaintiff, Timothy Trouy, stated that he believes that "every tire manufactured by Firestone should be subject to a recall." Trouy Dep. at 50. We first point out that many plaintiffs, even in individual suits, lack a sophisticated understanding of their claims or of legal strategy. Defendants cite no cases in support of the proposition that such lack of knowledge necessarily impedes class certification. In fact, there is case law to the contrary. *Paper Systems Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 609 (E.D. Wis.2000) ("[T]here is no requirement that the representative plaintiff be knowledgeable of either the allegations or the legal theories on which the law rests."). Furthermore, Defendants have offered no explanation of how this issue, should it become a problem, could not be solved by the formation of subclasses.

Likewise, other potential "conflicts" highlighted by Defendants do not merit the alarm bells Defendants attempt to sound. Defendants argue that class representatives cannot embark on strategies that harm segments of the class in order to increase the likelihood of class certification. Opp. at 93 (citing *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 & n.16 (S.D. N.Y.1982) (criticizing proposed class representatives for arguing choice of law position ultimately rejected by court); *Clay v. American Tobacco Co.*, 188 F.R.D.

483, 493 (S.D. Ill. 1999) (refusing to certify class on ground that proposed class representatives dropped claims which some members of proposed class could have pursued successfully as individuals)). According to Defendants, seeking to invoke the laws of Michigan and Tennessee is a strategy that sells out the class members from states with laws more favorable to plaintiffs. *Id.* The choice of law rules controlling this case dictate that the laws of Michigan and Tennessee apply, and arguing (correctly, in the Court's view) for their application, as Plaintiffs did, cannot defeat class certification. Defendants' other arguments are similarly unavailing. Hence, we conclude that Plaintiffs satisfy the last of the requirements of Rule 23(a).

C. Unavailability of "Hybrid" 23(b)(2)/(b)(3) Certification

Having found that the class certification requirements of Rule 23(a) are met, we now examine whether the criteria set forth in Rule 23(b) are satisfied. Plaintiffs first assert that this case is suitable for class certification as a hybrid "23(b)(2)/(b)(3)" class action.

Certification under Rule 23(b)(2) is appropriate when the class is seeking injunctive or declaratory relief. Seventh Circuit case law also permits "divided certification" under which "[t]he district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages." *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO,* 216 F.3d 577, 581 (7th Cir. 2000). Following our rulings on July 27, 2001, Plaintiffs' remaining claims are for damages under the theories of breach of warranty, violations of consumer protection statutes, and unjust enrichment. *Bridgestone/Firestone,* 155 F. Supp.2d 1069 (dismissing RICO, negligence and redhibition claims; permitting implied and express warranty claims, Magnuson Moss claims, unjust

enrichment claims, and, possibly, consumer protection claims); *In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 153 F. Supp.2d 935 (S.D. Ind. 2001) (dismissing Plaintiffs' claim for injunctive relief insofar as it requests a court-ordered recall, buy back, and/or replacement of the Tires). Plaintiffs maintain that declaratory relief is available because "the Court can find that the Tires and Explorers are dangerous, and implement classwide protective notice, or issue a declaration that Defendants must specify, manufacture and use tires with a safe, alternative design such as a nylon cap." Supp. Memo. in Support at 4. We agree with Defendants' characterization of these claims as little more than a request for a declaration that Defendants are financially responsible. This type of "declaratory" relief does not fit within the parameters of Rule 23(b)(2). *Cf. Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 820 (7th Cir. 2000) (overturning certification of defendant class under 23(b)(2) because, in part, plaintiff was merely seeking "a judgment declaring that a party is entitled to no money."). Hence, there is no portion of the case suitable for certification under Rule 23(b)(2). Moreover, where, as here, Plaintiffs' remaining claims are overwhelmingly claims for damages, Rule 23(b)(3) is the only appropriate potential vehicle for certification. *See Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3)....").

D. Certification Under Rule 23(b)(3)

We now turn to the propriety of class certification under Rule 23(b)(3), which requires that common questions predominate and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.

(1) Predominance

Common questions predominate when they "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil* § 1778. *See Amchem,* 521 U.S. at 591. Here, Plaintiffs must establish that common questions of law[17] or fact predominate with respect to the elements of their warranty, unjust enrichment, and consumer protection claims. We find that Plaintiffs have met this burden.

(a) Predominance of Common Defect Issue

All the surviving theories of relief in the Master Complaint require that Plaintiffs prove that something is wrong with the products at issue. For instance, Plaintiffs argue that Ford violated § 445.903(1)(e) of the MCPA, which prohibits "representing that goods or services are of a particular standard, quality, or grade ... if they are of another." Likewise, Firestone allegedly violated § 47-18-104(a)(7) of the TCPA which prohibits exactly the same behavior. Similarly, Plaintiffs assert that Defendants breached the express and implied warranties they extended to Plaintiffs by selling vehicles and/or Tires that were defective. Plaintiffs' unjust enrichment claim also depends upon proof that the vehicles and/or Tires were defective; in order to prevail on that claim, Plaintiffs must prove that the products Defendants sold were defective and that the prices they were paid for the products were therefore too high. Whether the Tires and/or Explorers are defective is a factual question that Plaintiffs intend to prove using common proof.

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[17] As explained earlier in this opinion, the Court has found that all class members' claims will be governed by the laws of Michigan and Tennessee; hence, as will be explained below, common questions of law predominate.

Firestone argues that the question of defect renders the class not suitable for certification because there are "over 280 distinct tire populations at issue" based on size, model, place of manufacture, failure rate and other factors. For instance, Firestone maintains that "[t]he core tire component—the inner liner—varies among tire designs in thickness and in the number of plies, depending on the needs of each product. The composition of body plies also varies depending on the performance requirements of the tire being produced." Opp. at 20 (citing Gardner Decl. ¶¶ 9-10). In addition, according to Firestone, sidewalls and steel-belt characteristics vary depending on the intended use for the tire model and size. *Id.* at 21.

In opposition, Plaintiffs point to persuasive evidence that Firestone has significantly exaggerated distinctions among the Tires. For example, Robert Martin, a retired Firestone Vice President of Corporate Quality Assurance, testified that differences between 15- inch and 16-inch Tires likely are negligible. Martin Dep. of 11/27/00 at 272. Specifically, he stated:

> The materials that are used in the 15-inch and 16-inch tire, for example, the body ply, was probably the same polyester material. The steel belts could be the same steel. The tread components could be the same. The sidewall compounds could be the same. The inner liner could be the same. Many components could be common.

Other Firestone officials testified similarly regarding other variations claimed by Defendant to be significant. Gregory Bond, foreman of the "B" Crew in the tire room at Firestone's Decatur plant, testified that he would expect the rubber compounds to be the same regardless of whether the Tires were

produced at the Decatur or Wilson plants. Bond Dep. of 6/20/01 at 53.

At the hearing, the parties also discussed a difference between one group of allegedly faulty Tires and another group of allegedly faulty Tires. However, even if this distinction turns out to be significant upon fuller development of the evidence, it hardly furthers Firestone's argument that common issues do not predominate. Beginning in 1995, Firestone undertook a manufacturing cost-reduction program, called "C95." Transcript at 30, 47-48, 145-46. These cost reductions allegedly made the Tires lighter. *Id.* at 30. In addition, at the hearing, Plaintiffs' counsel cited evidence that the accident rate for vehicles with these Tires increased following the implementation of the program. *Id.* at 30-31. Hence, evidence may show that 1995 and later model Tires should be put in a different subclass than 1994 and earlier model Tires, but this distinction is far from constituting the "over 280 distinct tire populations" based on the wide variety of factors propounded by Firestone. As such, we find that Firestone's arguments about the variety of Tires at issue do not defeat Plaintiffs' assertion that defect can be demonstrated (or disproved) by common proof.

With regard to defect, Ford makes an argument similar to that advanced by Firestone. Ford argues that Plaintiffs cannot meet their burden of advancing a defect theory and supporting evidence that is applicable to all Explorers. Opp. at 26. Ford's argument is not persuasive. In fact, Ford itself treated all Explorer models and years the same for many purposes. For instance, before December of 2000, Ford recommended a uniform tire inflation of 26 psi on 15 inch tires on Explorers, regardless of configuration, payload, or equipment. Because tire pressure is critical, in Ford's view, to rollover propensity, this "classwide" treatment is significant. *See* Lee Carr Dep. Ex. 18. Likewise, when serious problems began to appear with Explorers

and Firestone Tires in the Middle East and South America, Ford generally treated Explorers as a class, with little differentiation as to model year or as to whether the vehicle was a four-wheel drive or a two-wheel drive vehicle. A draft of a document dated August 16, 1999 entitled "1995/99 Explorer/Mountaineer P255/70R16 Tire Separation in GCC[18] Countries" refers to Explorers throughout this period as being affected by the problem described as "Rollovers attributed to tire tread separation." Reply Ex. 27, Tab C.[19] In addition, some of the remedial actions considered by Ford were the same across model years. While we recognize that Ford states that the Tires, rather than the vehicles, are responsible for rollover accidents, the Court finds that this similar treatment of all Explorers, regardless of variations Ford now claims are significant, provides common proof to Plaintiffs with which to argue their case.[20] Whether Plaintiffs will succeed on the basis of this common evidence is

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[18] "GCC" stands for Gulf Cooperation Council. Member countries are Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, and the United Arab Emirates. The draft report on tire separation refers to the affected markets as the GCC states and Yemen, Jordan, Lebanon, and Syria. Reply Ex. 27, Tab C.

[19] This document was filed under seal by Plaintiffs on May 17, 2001, because Ford had designated the document "Confidential" as provided by the Court's Confidentiality Order dated March 7, 2001. Ford, however, has not filed a motion requesting that the seal be maintained (as provided in the Court's *nunc pro tunc* Order of March 20, 2001), and the seal has therefore been automatically lifted.

[20] We also note that Ford is not the only entity to group Explorers for the purpose of examining the problems called to its attention. NHTSA concluded that it is appropriate to group Explorers into the following four groups to calculate the static stability factor ("SSF"): 4-wheel drive Explorers, model years 1991-94; 4-wheel drive Explorers, model years 1995-1998; 2-wheel drive Explorers, model years 1991-94; and 2-wheel drive Explorers, model years 1995-98. 66 Fed. Reg. 3413, Table 2. While sub-classing may be necessary at a later point, for now, we find that Plaintiffs offer sufficient classwide proof of Explorer defect to warrant class certification.

not the question before us.

Ford further objects to the certification of an Explorer class on the ground that Plaintiffs must distinguish the Explorer from other makes of similar vehicles because Plaintiffs' theory is that Explorers have an "unreasonable tendency" to roll over. Opp. at 27. In *Walsh v. Ford Motor Co.*, the court explained that "[t]he plaintiffs' burden on remand was to identify reasonably a body of evidence which is common to all of the different Ford vehicles at issue and *which distinguishes the special characteristics* causing [the alleged defect] in Ford vehicles *from comparable non-Ford vehicles.*" 130 F.R.D. 260, 269 (D.D.C. 1990) (emphasis added); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986). Ford argues that the same standard must apply here. According to Defendant, it is not enough that the Explorers be alike; they must also be alike in a way that distinguishes them from peer vehicles. Opp. at 26.

We are not convinced by Ford's argument or by the rule set forth in *Walsh* on which it is based. First, Ford cites no authority for the proposition that showing an "unreasonable" rollover tendency can only be accomplished by demonstrating that the product at issue differs in some way from similar products. Neither the district court in *Walsh* nor the appellate court that established the burden provided the reasoning behind their rule that "unreasonable" must mean "different," and we find that such a proposition runs counter to logic. A defect can be statistically common, but still unreasonable. At the certification hearing, Plaintiffs' counsel stated that "[w]e would never let the Pinto off simply because the Torino blew up too." Transcript at 40. This lawsuit is about whether Ford is at fault for producing defective Explorers, not about whether some other manufacturer is at fault for producing defective vehicles that compete for sales with the Explorer.[21] Second, whether the Ford Explorer exhibits an

[21] Ford, of course, is entitled to defend itself against a finding of

unreasonable tendency to roll over is a merits question, unsuitable for resolution at the class certification stage. At the moment, we are interested only in whether Plaintiffs have demonstrated that they can offer representative proof on this issue. *See Szabo*, 249 F.3d at 676. Demonstrating that all the vehicles encompassed by the class definition share similar characteristics with regard to the alleged defect is sufficient to establish that common issues of material fact predominate.

(b) Predominance of Other Common Issues

While the issue of defect is central to this case, we must examine whether common issues predominate with respect to the other elements of Plaintiffs' claims. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 186-87 (3d Cir. 2001) ("We began our analysis by examining the elements of the underlying cause of action, noting that such an analysis is critically important to the predominance determination under Rule 23(b)(3).").

(i) Consumer Protection Claims

With regard to Plaintiffs' claims under the consumer protection statutes of Tennessee and Michigan, Defendants maintain that the need to establish individual reliance defeats predominance. Supp. Memo. in Opp. at 18-19. Much of Defendants' argument is based on our earlier ruling in which we determined that "[s]hould the Plaintiffs wish to prosecute their suits under the TCPA and MCPA individually, they shall be granted leave to amend the complaint in order to allege individual reliance." *Bridgestone/Firestone*, 155 F. Supp.2d at

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"unreasonable" rollover tendency with evidence of peer vehicles' rollover rates, as well as with any other evidence that tends to refute Plaintiffs' claim of "unreasonableness."

1109. We reasoned that both statutes require "a causal link between the alleged misrepresentation or omission and the injury." *Id.* at 1108. Plaintiffs' rebuttal to Defendants' argument is contained in both the class certification briefing and in the briefs submitted in conjunction with Plaintiff's motion for reconsideration of these portions of the July 27, 2001 Order. We examine this issue with regard to both motions in light of additional briefing on the subject and our finding explained above regarding the availability of the class action mechanism to pursue consumer protection claims.

We examine the Michigan Consumer Protection Act first. In our prior ruling, we noted that "the Supreme Court of Michigan held 'that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations [as long as] ... the class can establish that a reasonable person would have relied on the representations.' " *Bridgestone/Firestone*, 155 F. Supp.2d at 1108-09 (quoting *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987)). We ruled, however, that because Plaintiffs cannot bring a class action under the MCPA on behalf of a nationwide class, they were subject to a different pleading standard set forth in other Michigan cases requiring individual proof that Ford's alleged bad acts caused their injuries. *Id.* at 1109 (citing *Mayhall v. A.P. Pond Co., Inc.*, 341 N.W.2d 268, 270 (Mich. Ct. App. 1983); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999); and Mich. Comp. Law § 445.911(2)). As explained earlier in this ruling, Plaintiffs are permitted to bring a class action under the MCPA. Hence, the procedure set up in *Dix*, through which class plaintiffs can demonstrate reliance based on the inference of what a reasonable person would do, is available to the members of the class proposed here.

Defendant Ford attempts to distinguish *Dix* on the ground that the court did not examine the language of the Michigan

statute. Supp. Opp. at 19 n.17 (citing *Dix*, 415 N.W.2d at 210). As with our recognition that the Tennessee courts, after reading presumably the same text of the TCPA available to us, implicitly interpreted the TCPA so that it does not preclude class actions, we find also that the Supreme Court of Michigan has done the same, interpreting the MCPA to allow proof of reliance based on reasonable inference, at least in class action cases. In *Gilkey v. Central Clearing Co.*, a federal district court in Michigan reached a similar conclusion. 202 F.R.D. 515, 525-26 (E.D. Mich. 2001). There, the court found that the proposed class representative was adequate in an MCPA action despite the defendants' argument that the proposed class representative testified that he did not rely upon the allegedly false disclosures. *Id.* (quoting *Dix*, 415 N.W.2d at 209). The courts in both *Dix* and *Gilkey* reasoned that the Consumer Protection Act should be construed liberally so as "to provide an enlarged remedy for consumers who are mulcted by deceptive business practices" and that because the Act allowed for class actions, recognizing that reliance could be shown on a representative basis was necessary to effectuate the statute's remedial purpose. *Dix*, 415 N.W.2d at 209; *Gilkey*, 202 F.R.D. at 525-26.

Defendant Ford also argues that common representations were at issue in *Dix* but are not crucial to Plaintiff's case here and that, hence, common issues do not predominate with respect to the MCPA. Supp. Memo. in Opp. at 19 n.17. Ford overstates *Dix*. The remainder of the paragraph cited by Ford acknowledges that the misrepresentations may vary a little from plaintiff to plaintiff without defeating class certification. *Dix*, 415 N.W.2d at 210 ("The alleged misrepresentations may differ somewhat from plaintiff to plaintiff, but, if the plaintiffs' allegations are true, they are all substantially similar and are all part of a common scheme."). Furthermore, in *Dix*, material omissions formed another basis for the plaintiffs' claims. *Id.* at 207.

Plaintiffs here can apparently produce both types of evidence

in order to make their case to the jury. Plaintiffs present evidence that Ford engaged in a national advertising campaign to disseminate a common message to all consumers. Examples of these advertisements tout the Explorer's "exceptional control," "smooth ride and excellent handling," and "reputation of high quality, dependability, and trust." Compl. ¶ 124(a)(b)(g) (citing ads in *People*, 12/31/99; *Newsweek*, 12/15/97; *Ebony* 09/95; *Essence* 01/96; and *Black Enterprise* 02/97). Certainly, as Ford points out, other advertisements making different representations about Explorers were placed in local and regional publications by dealers and dealer associations. Scott Aff. ¶ 3. Ford does not dispute that the Explorer was promoted through national advertisements like the ones cited above. Such advertisements, while they lack specificity and may ultimately fail to convince a jury that Ford made misleading representations to customers, do constitute a core of alleged common misrepresentations relevant to Plaintiffs' MCPA claim.

In addition, Plaintiffs also point to common evidence that Ford made material omissions by failing to reveal defects in Explorers about which they contend Ford was aware. For instance, on October 15, 1986, R.J. Bacigalupi, a Ford engineer, sent a memorandum to C.A. White, discussing stability of the Explorer while it was still in development. Plaintiffs' Rebuttal Bench Book, Tab C, Ex. 11.[22] He stated that lowering the vehicle, adding weight low in the vehicle, and widening the track were better alternatives to changes in tire size. *Id.* Mr. Bacigalupi then added, "Cost or timing implications of these kind [sic] of actions tend to stall them in their tracks." At the hearing on class certification, Plaintiffs' counsel highlighted the following quote from a document authored by Roger Stornant, a Ford employee, in late 1989: "I believe that management is aware of the potential

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[22] This document was originally filed under seal, but for the same reasons explained in *supra* note 19, the seal has been lifted.

risk with the P235 tires, and they have accepted the risk." Transcript at 28. If true, we conclude that a jury could find that a reasonable person would have changed his or her purchasing decision if this information had been available, and these omissions buttress our conclusion that common issues predominate as to the MCPA claims.[23]

In our July 27, 2001 Order, we held that, while the TCPA formally does not require plaintiffs to prove reliance, they must "indicate 'how the deceptive act affected the contested trade.' " *Bridgestone/Firestone*, 155 F. Supp.2d at 1109 (quoting

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[23] Ford maintains that common issues also do not predominate with respect to two other elements of an MCPA claim. Defendant argues that individualized inquiries would be needed concerning whether each purported class member bought his or her vehicle "primarily for personal, family, or household purposes." Supp. Opp. at 19 (quoting Mich. Comp. Laws § 445.902(d)). We recognize that, under Michigan case law, whether the class member used his or her vehicle primarily for personal use is an individualized question. *Zine*, 600 N.W.2d at 401. However, such a question is a rather simple one. *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 n.4 (7th Cir. 1974) ("Even if it is necessary to review the contracts individually to eliminate business purchases, ... such a task would be neither hereculean [sic], inhibiting, nor for that matter ... unique.") (internal quotation omitted). Hence, individualized inquiry into consumer or business status does not defeat class certification. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 198 F.R.D. 503, 506 (N.D. Ill. 2001) (certifying class of debtors suing under Fair Debt Collection Practices Act (FDCPA) despite defendants' argument that only consumer debts are covered by the FDCPA and that eliminating business debtors was individualized inquiry); *see also Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981) (while meaning of "predominance" not explained by the rule, the term does not mean that *every single* issue must be common). Ford also argues that each class member would have to prove what his or her expectations were in order to prevail under the MCPA. Supp. Opp. at 19. We find that this issue is so intimately wrapped up in the question of reliance that it too can be demonstrated through the expectations of a reasonable person. *See Dix*, 415 N.W.2d at 209; *cf. Bridgestone/Firestone*, 155 F. Supp.2d at 1109 (considering loss under MCPA as frustrated expectations *after* finding that individual reliance must be shown *in non-class action cases*).

Ganzevoort v. Russell, 1995 WL 623047, at *2-3 (Tenn. Ct. App. Oct. 25, 1995)). Indeed, proximate cause is a required element of claims under the consumer protection statute in Tennessee. *E.g., Harvey v. Ford Motor Credit Co.*, 1999 WL 486894, at *2 (Tenn. Ct. App. July 13, 1999) ("T.C.A. § 47-18-109 establishes a private right of action for any person who suffers an ascertainable loss as a result of the use or employment by another person of an unfair or deceptive act or practice.") (internal quotation omitted). The question presented here concerns the options plaintiffs have for proving proximate causation.

As Firestone properly points out, Plaintiffs cannot claim that common affirmative misrepresentations affected their purchasing decisions. Unlike the situation with the Ford Explorer, the subject Tires were not the focus of a national ad campaign. None of the national tire advertisements in the Master Complaint mentions ATX, ATX II or Wilderness AT tires. Compl. ¶ 127. Most advertising for Firestone tires was done through numerous retailers at the local and regional level and was not subject to much central direction. Pence Declaration ¶ 2, 5. Any representations made to individuals at the time of sale certainly would not be uniform for the millions of class members.

However, it appears that Plaintiffs can produce common evidence of material omissions by Firestone. For instance, Plaintiffs have produced some evidence that officials at Firestone were aware of problems with the Tires long before a recall was announced on August 9, 2000. The Tire Adjustment Data that has been the subject of discovery motions suggests that, in the mid-1990s, Firestone was aware of an increase in belt edge separation and belt-leaving- belt separation in the radial ATX tire. Transcript at 48. Furthermore, a jury could find that Firestone concealed problems with the Explorer in combination with its Tires and that Firestone acquiesced, if not actively participated, in the decision to lower the recommended tire

pressure of the Tires on Ford Explorers, despite awareness that a lower psi would compromise Tire performance. Transcript at 29-30.

On the basis of these alleged omissions, a jury could infer that Firestone concealed information from Plaintiffs that, if known, would have prevented them from purchasing the Tires. Defendants argue that concealment of information cannot constitute proximate cause as required by the TCPA. Opp. to Reconsideration at 14. Defendants base their argument on *Harvey,* 1999 WL 486894, at *2. In *Harvey,* the court dismissed a TCPA claim, rejecting Mr. Harvey's claim that he was "required to pay hidden fees." *Id.* Defendants' interpretation of *Harvey* reads too much into that decision, in our view. The court continued its analysis following the excerpt relied upon by Defendants, noting that although the exact allocation of the payment between dealer and defendant was not revealed to the plaintiff, Mr. Harvey was aware of the overall payment and total interest rate. *Id.* Because the plaintiff did not allege that he would have refused to engage in the transaction had he known that some portion of his payment would go to the dealer and because Mr. Harvey knew the total rate, there was no "hidden fee" at issue to form the basis of the case. *Harvey* cannot prevent a jury from basing its decision on an inference (that information concerning the alleged defect would have had an impact on Plaintiffs' purchasing decisions) common to all class members. Hence, common issues predominate with respect to Plaintiffs' TCPA claims.

(ii) Express Warranty Claims

Plaintiffs' breach of express warranty claims are based upon three distinct theories: written warranties, warranties created by advertising, and warranties created by oral representations made to individual Plaintiffs at the time of sale. The propriety of certifying a class as to each of these theories is discussed in turn

below.

Defendants[24] argue that Plaintiffs' breach of express warranty claims are based upon a wide variety of written warranties that differ in numerous ways: for example, both durational limitations (based on time, mileage, and/or tread wear) and applicable exclusions (e.g. commercial use, negligent use) vary depending upon which Firestone written warranty is applicable to a given Plaintiff. Which written warranty, if any, that each Plaintiff received depends upon when and where that Plaintiff purchased his or her vehicle or Tires. Although Defendants argue that these variations in written warranties will require individualized inquiries into each Plaintiff's purchase and use of the vehicles and Tires, it is unclear to us how the vast majority of these individualized inquiries will be relevant to Plaintiffs' claims. All of the applicable written Firestone warranties provide coverage if the tires "become unusable for any reason within the manufacturer's control" within a given time period, or within a given amount of tread wear on the tire. Under Plaintiffs' express warranty theory, each and every Tire included in the class definition was "unusable" at the moment it was purchased due to a design defect. Therefore, with the exception of the "commercial use" exclusion that may be applicable to some Plaintiffs,[25] none of the exclusions contained in the warranty,

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[24] Defendants jointly make this argument, but only point specifically to the variations in Firestone's written warranties. Perhaps this is because, while Ford's written warranties vary somewhat from model year to model year, we have already determined that the variations are not relevant to the Plaintiffs' claims in this case. *Bridgestone/Firestone,* 155 F. Supp.2d at 1114. All of the warranties contain the provision that Ford's dealers will "repair, replace or adjust all parts (except tires) ... that are defective in factory-supplied materials or workmanship for 3 years or 36,000 miles (whichever occurs first)."

[25] The Court does not view the issue of whether each Plaintiff purchased the Tire for personal or commercial purposes, which for the vast majority of Plaintiffs can be resolved in a simple and straightforward manner, to be sufficient to defeat predominance. *See Simer,* 661 F.2d at 672 (term

which relate to the use (or abuse) of the tire after purchase, would be relevant. Plaintiffs' express written warranty claim against Firestone ultimately will rise or fall depending on whether they, as a group, using classwide proof, are able to prove that all of the Tires were "unusable," as that term is used in the Firestone warranties, at the time of purchase.[26] Similarly, the Plaintiffs' express written warranty claim against Ford ultimately will depend upon whether the Plaintiffs, as a class, are able to prove that all of the Explorers included in the class definition were "defective in factory-supplied materials or workmanship," as that term is used in Ford's written warranties, when they were sold. These common issues predominate the Plaintiffs' claims for breach of express written warranties.

Defendants also argue that individualized proof will be required to support Plaintiffs' claim that the durational limits contained in the applicable written warranties are unconscionable, manifestly unreasonable, fail of their essential purpose, and therefore are unenforceable.[27] The Plaintiffs' claim, however, is that the durational limits in the written warranties were rendered unenforceable because each Defendant knew its product was defective at the time it extended the warranty to each Plaintiff and actively concealed the defect from the Plaintiffs (and everyone else), so that the Plaintiffs were unable to enforce their warranties within the time limit provided. This

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"predominance" does not mean that *every single* issue must be common).

[26] As discussed below, claims for property damage (including to the tire itself) based upon a tread separation or other outward failure of a Tire are not appropriate for class certification, precisely because of the highly individual questions regarding whether the failure was caused by a defect in the Tire or something else, such as the types of misuse which may be excluded under some of Firestone's written warranties.

[27] This argument is also applicable to the Plaintiffs' breach of implied warranty claim.

claim therefore will succeed or fail based upon proof of the Defendants' conduct and knowledge, which will be applicable to the class as a whole.[28]

Defendants further argue that, under both Tennessee and Michigan law, in order to prevail on the breach of express warranty claims, each individual Plaintiff will have to prove that he or she relied upon the terms in the warranty when deciding to purchase the vehicle or Tires. As far as the Defendants' written warranties are concerned, the Court disagrees. The relevant U.C.C. provision, U.C.C. § 2-313(1)(a),[29] does not require a showing of reliance by the buyer; rather, it provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[30] Defendants have cited no case

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[28] The Defendants argue that, even under the Plaintiffs' theory, their knowledge regarding the alleged defects changed over time, and that what they knew and when they knew it will be relevant to whether the exclusions in each particular Plaintiff's warranty was unconscionable at the time of purchase. The questions of what each Defendant knew and when, and the relationship of that knowledge to the unconscionability issue, will certainly have to be answered. However, the answers to those questions will apply to all of the Plaintiffs, and once it is determined whether, and at what point, the warranty exclusions became unconscionable in light of the Defendants' knowledge and actions, it will be a simple matter to determine on which side of that line a Plaintiff's purchase falls.

[29] The relevant state statutes, Mich. Comp. Laws § 440.2313 and Tenn. Code. Ann. § 47-2-313, are substantively identical to the U.C.C. provision.

[30] Ford cites to *Monte v. Toyota Motor Corp.*, 2001 WL 1152901 (Mich. Ct. App. Sept.28, 2001), for the general proposition that, under Michigan law, reliance is an element of an express warranty claim. The court in *Monte* held that the plaintiff could not base an express warranty claim on descriptions of his vehicle's Supplemental Restraint System contained in the Owner's Manual and Owner's Guide because the plaintiff received those documents "after the bargain was already struck" and therefore could not have relied on any

in which a court has ruled that an express written warranty provided to a consumer upon the purchase of a product was unenforceable by the consumer because it was not part of the basis of the bargain.[31] Whether the consumer was aware of the terms of the written warranty before the purchase or not, it was certainly part of the bargain, in that the warranty was part of what the seller sold to the buyer.[32]

The official comments to U.C.C. § 2-313 support this holding. Official Comment 7 provides:

> The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract.

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statements therein. The court cited no authority for this holding, and did not discuss whether it believed that reliance was synonymous with the U.C.C.'s "basis of the bargain" requirement. The court also did not address the official comments to the U.C.C., discussed below, which address the creation of express warranties via post-sale statements. In any event, we are not bound by this unpublished decision, *see* Mich. Ct. R. 7.215 ("An unpublished opinion is not precedentially binding under the rule of stare decisis."), and in light of its conclusory nature, we do not find it persuasive precedent.

[31] Indeed, such an interpretation of the law "would, in effect, render almost all consumer warranties an absolute nullity," inasmuch as it is common practice for warranty booklets to be provided to consumers inside the sealed box in which a product is packaged, or, in the case of vehicles, in the glove box of a new car upon delivery. *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 531 (N.Y. App. Div.1992).

[32] As discussed above, Defendants themselves rely upon the durational limitations contained in their written warranties; Defendants cannot seriously suggest that the terms of the written warranties favorable to them are enforceable, while the terms favorable to the Plaintiffs are not enforceable.

A buyer certainly cannot prove that she relied upon an affirmation made after the closing of the deal in deciding whether to consummate the deal; however, the U.C.C. clearly contemplates that such post-sale affirmations can be enforced as warranties, as long as they "are fairly to be regarded as part of the contract." *See Murphy,* 582 N.Y.S.2d at 531 (holding that written warranty given to plaintiffs at time of delivery of motor home, after purchase price had been paid, was part of basis of bargain). Accordingly, we determine that Plaintiffs need not demonstrate reliance on the written warranties in order to enforce the terms of those written warranties against Defendants, and, further, no individual proof that the written warranties received by Plaintiffs (or, more likely, a subclass of Plaintiffs) were part of the basis of each Plaintiff's bargain will be required.

The same is not true of Plaintiffs' express warranty claim based upon the Defendants' advertising, however. Even assuming that Plaintiffs will be able to demonstrate that each Defendant conducted extensive, nationwide advertising campaigns about its respective products, and that those advertising campaigns contained statements sufficiently specific to create a warranty that the products were safe, or that the products had some other quality they did not actually have,[33] the existence of such advertising, is not sufficient, in and of itself, to demonstrate that the statements in the ads were part of the basis of the bargain when each Plaintiff purchased his or her Tires or Explorers. Unlike a written warranty given to a consumer as part of that individual consumer's purchase transaction, advertisements are simply put out for public consumption by a

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[33] As discussed in the above section on the elements of consumer protection act claims, with regard to Firestone, this assumption is unwarranted. ATX, ATX II, and Wilderness AT tires were not promoted through national ad campaigns. As to Ford, we note again the lack of specificity in most of the ads cited by Plaintiffs.

company in the hopes that they will be seen (or heard) and considered by potential buyers, who will then be induced to become actual buyers, in whole or in part because of the advertisements. For some Plaintiffs, the advertisements likely were successful, and those Plaintiffs may well demonstrate that statements in Defendants' ads were part of the basis of their bargain. For other Plaintiffs, however, this will not be the case, and those Plaintiffs will not have a breach of warranty claim based upon Defendants' advertising. *See, e.g., Masters v. Rishton,* 863 S.W.2d 702, 706 (Tenn. Ct. App. 1992) (breach of express warranty not available to plaintiff who had never seen any advertisements for or heard any representations about the safety of the product at issue); *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 370 (E.D. Mich. 1977) ("It is clear that advertisements and promotional literature can be a part of the basis of the bargain where they are prepared and furnished by a seller to induce purchase of its product and the buyer relies on the representations."); *Omega Engineering, Inc. v. Eastman Kodak Co.,* 30 F. Supp.2d 226, 246 (D. Conn. 1998) ("While advertisements can be part of the basis of the bargain, the plaintiff must show, at a minimum that he or his agent knew of and relied on the statement.") (citing 1 J. Wright & R. Summers, *Uniform Commercial Code* § 9-5, at 494-95 (1995)); *American Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 436-37 (Tex. 1997) (plaintiff could not prevail on express warranty claim based on advertisements when he could not show that he saw or relied upon the defendant's advertisements).

While the Court need not, and thus will not, delve into the issue of precisely what type of proof would be required for a Plaintiff to prevail on an express-warranty-created-by-advertising claim, it is clear that the claim cannot be established by classwide proof. Rather, an examination of each Plaintiffs' exposure to, and consideration of, Defendants' various ads would be required. It is also clear that this inquiry will not fall into the

same simple and straightforward category as proof of when and from whom a class member purchased the Tires and/or Explorer; rather, it almost certainly will require credibility determinations and other individual, unwieldy factual and legal determinations. We determine that these substantial individual issues preclude a finding that common issues will predominate in the resolution of Plaintiffs' claim for breach of express warranty based upon advertising, and therefore we decline to certify classes as to that claim.

For the same reasons that Plaintiffs' advertising-related warranty claims are not amenable to class certification, to the extent that some Plaintiffs assert express warranty claims based upon oral representations made to them at the time of sale, those claims clearly are not common to the class as a whole, and therefore are not appropriate for class certification. Accordingly, no classes are certified as to those claims.

(iii) Implied Warranty Claims

As discussed above, the issue of product design defect is common to all Plaintiffs' breach of implied warranty claims. Under Plaintiffs' theory, the defects in the Explorer and the Tires rendered them unmerchantable at the time of sale, and therefore Defendants are liable for breach of the implied warranty of merchantability. This common issue undoubtedly predominates the Plaintiffs' breach of implied warranty claims.

Defendants argue, however, that the requirement of predominance is nevertheless defeated because Plaintiffs will be unable to use classwide proof to demonstrate privity between each Plaintiff and Defendants. As for Ford, this argument is entirely unavailing, inasmuch as privity is not required for breach of implied warranty actions under Michigan law. *See Jennings v. Southwood*, 521 N.W.2d 230, 234 n.5 (Mich. 1994)

(noting that the Michigan Supreme Court eliminated the privity requirement in actions for breach of implied warranty) (citing *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958)); *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800, 804 (Mich. Ct. App. 1970) (holding, after extensive discussion, that Michigan law does not require privity in breach of implied warranty action, even if only economic loss is involved), cited with approval in *Greenfield Die & Mfg. Corp. v. John H. Powers, Inc.*, 2000 WL 33413347, at *1 (Mich. Ct. App. Aug. 1, 2000) ("[P]rivity of contract is not required in order for a plaintiff to maintain an action for breach of warranty under the UCC. This rule applies even where, as here, the loss claimed is purely economic.") (citations omitted); and *Sullivan Indus., Inc. v. Double Seal Glass Co., Inc.*, 480 N.W.2d 623, 628-29 (Mich. Ct. App. 1991) (same); *but see Downriver Internists v. Harris Corp.*, 929 F.2d 1147, 1149 (6th Cir.1991) (stating that Michigan has abolished the privity requirement only as to warranty cases based on personal injury, and not as to "breach of contract action[s] for economic losses").[34] As the court in *Cova* explained, Michigan courts have determined that "[o]n principle the manufacturer should be required to stand behind his defectively-manufactured product and held to be accountable to the end user even though the product caused neither accident nor personal injury. The remote seller should not be insulated from direct liability where he has merely mulcted the consumer." *Cova*, 182 N.W.2d at 804.

As for the implied warranty claims against Firestone, Plaintiffs correctly concede that privity is required under Tennessee law where no personal injury or property damage is

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[34] We note that both *Downriver Internists* and the case cited therein, *National Sand, Inc. v. Nagel Const., Inc.*, 451 N.W.2d 618 (Mich. Ct. App. 1990), involved commercial, not consumer, transactions. Indeed, the *National Sand* case did not involve a warranty claim at all.

involved. Therefore, it will be necessary to determine whether each Plaintiff satisfies the privity requirement in order for that Plaintiff to succeed on the breach of implied warranty claim. This fact alone does not make class certification improper, however. Each Plaintiff obviously will have to prove that he or she owned or leased a vehicle with one of the types of Firestone tires included in the class definition. For purposes of establishing privity, each Plaintiff will also have to prove from whom he or she purchased the relevant Tires, which seems to the Court to add little, if any, additional burden, either on the parties or on the ultimate fact finder. The universe of sellers from whom the Plaintiffs' Tires were purchased can then be divided into categories, and, if necessary, the class can be divided into subclasses.[35] The question of privity can then be examined as to each category or subclass. For example, those Plaintiffs who purchased their Tires from a private individual—for example, as part of the purchase of a used Explorer or other vehicle—clearly will not be in privity with Firestone, and all Plaintiffs who fall into that subclass likely will not have a viable breach of implied warranty claim against Firestone. More complex factual and legal issues such as agency may be involved in determining whether those Plaintiffs who purchased their Tires as original equipment on a Ford Explorer from a Ford dealership, or as replacement tires from a Firestone dealer, or from an independent retailer like Sears or Wal-Mart, are in privity with Firestone. However, Plaintiffs assert, and Defendants do not genuinely dispute, that these types of sellers also can be divided into discrete subclasses based upon the sellers' relationship, if any, with Firestone.[36] The issue of privity then can be determined

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[35] The Court contemplates that the necessity for, and the definitions of, any such subclasses will be clarified as a result of discovery, summary judgment procedures, and/or the stipulations of the parties.

[36] The use of these subclasses also can address Defendants' concern that each Plaintiff will have to demonstrate "whether the tires or Explorers were purchased in a manner in which a written warranty from Firestone or Ford

as to all of the Plaintiffs within each subclass. Plaintiffs would thus be able to prove privity with Firestone, if at all, by classwide, not individual, proof. Accordingly, the privity requirement under Tennessee law does not defeat predominance in this case.[37]

(iv) Unjust Enrichment Claims

As an alternative to their breach of express warranty claims, Plaintiffs have asserted an unjust enrichment claim against Defendants. In order to prevail on their unjust enrichment claim, under either Tennessee or Michigan law, Plaintiffs will have to demonstrate that (1) Ford and/or Firestone received a benefit at the expense of the Plaintiffs and (2) it would be inequitable or unjust for Ford and/or Firestone to retain that benefit. *See Michigan Educ. Employees Mut. Ins. Co. v. Morris*, 596 N.W.2d 142, 151 (Mich. 1999); *Newton v. Cox*, 954 S.W.2d 746, 748 (Tenn. Ct. App. 1997). Plaintiffs allege that Defendants were unjustly enriched by selling defective Explorers and Tires for the price of non-defective Explorers and Tires. In other words, the wholesale price the Defendants received for their defective

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might attach." Defendants' Opposition at 55. Defendants' own phrasing of this issue demonstrates that the question of whether an individual Plaintiff received a written warranty from Ford or Firestone—and indeed what the terms of the written warranty were—will be answered by looking at where (or from whom) and when the Plaintiff purchased the vehicle or Tires.

[37] In its Response to Plaintiffs' Bench Book Filing at 30, Ford also argues that, as to the breach of implied warranty claims, "another significant, highly individualized issue is what each putative class member did after discovering the defect and the related issue of when he/she supposedly made the discovery." While, as the Michigan cases cited by Ford suggest, these issues may be relevant in tort-based product liability claims (because they are relevant to the issues of contributory negligence or assumed risk) they are entirely irrelevant to the contract-based breach of warranty claims involved in this case.

products was too high. Obviously, this claim, like the warranty claims, depends primarily upon a showing of defect, a classwide issue. The amount of excess revenue received by Defendants, if any, will also be demonstrated by classwide, expert testimony, and will be calculated on a per vehicle, rather than a per Plaintiff, basis.[38] The amount of the excess revenue to which each Plaintiff is entitled will, under Plaintiffs' theory, be determined by an apportionment process, which will depend upon evidence of when and from whom each Plaintiff purchased the vehicle or Tires.[39] However, as we have stated before, those straightforward factual questions are not the type of individual issues that defeat a finding of predominance. Rather, the predominant issues relevant to Plaintiffs' unjust enrichment claim are those common to all Plaintiffs—whether the Explorer and the Tires were defective at the time of sale and whether because of that defect Defendants received excess (i.e. unjust) revenues from their sale.

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[38] Defendants also argue that predominance is defeated to the extent that Plaintiffs seek recovery for a diminution of the resale value of their Explorers. However, the Court does not understand the Plaintiffs to be seeking such damages, given the claims remaining in the case. (We understand their claim to be for diminished value at the time of the sale.) *See* Transcript at 65 ("Warranty claims, the unjust enrichment, the potential claims for consumer trade practices, all involve the defendant's [sic] misconduct at the time they had sold a new vehicle. Therefore, they all relate to the overpayment for a new vehicle.") (statement by Plaintiffs' counsel).

[39] Defendants suggest that the retail price paid by each Plaintiff, not the wholesale price received by Defendants, is the relevant inquiry. The Court disagrees. The relevant inquiry under Plaintiffs' theory will be the amount Defendants inequitably earned from the sale of defective Explorers and Tires. If Plaintiffs are to prevail on their unjust enrichment claim, it will have to be on the basis of expert testimony that will demonstrate the amount per vehicle and/or Tire by which the price Defendants received exceeded the price they should have received, given the defects in the Explorers and Tires. This expert testimony will apply classwide, and will not depend upon the amount each Plaintiff actually paid for the product.

(v) Property Damage Claims

As we noted in our November 28, 2001 Order, the Court denies the Plaintiffs' motion to certify a subclass of persons who have sustained property damage as a result of a tread separation incident. Although we have found that Plaintiffs can pursue their other claims on a classwide basis, the nature of the proposed property damage claims will differ significantly. It will be necessary for each individual class member to prove (1) that the defect caused his or her tread separation incident, (2) that the claimed property damages were caused by his or her tread separation incident, and (3) that the damages warrant a particular, individual monetary award. Common issues would not predominate in a trial of these claims.[40] Certification of a property damage subclass is therefore denied.[41]

(2) Superiority

Rule 23(b)(3) also requires Plaintiffs to establish that a class action would be the "superior" manner in which to resolve the controversy. Four factors are to be considered:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any

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[40] Moreover, it is more difficult to conclude that class treatment of these claims is otherwise a superior method of adjudication. If a class member's property damage is significant, maintenance of an individual action is more likely to be economically feasible.

[41] Denial of certification will not, however, exclude persons who have incurred property damage from the Tire Class definition. These persons, unless they opt out of the class to pursue their claims on an individual basis, will be treated as Tire owners and will be entitled to recover to the same extent as other Tire owners, but they will not recover for property damage resulting from alleged Tire failures.

> litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

We address these factors in order. Prior to the consolidation of this matter in MDL proceedings and to the filing of the Master Complaint, a number of similar class actions had been filed in various courts.[42] In contrast, neither Defendants nor Plaintiffs have called our attention to the filing of any individual suits seeking damages for breach of warranty, unjust enrichment, or consumer protection act violations. Hence, there appears to be little interest in individual control of this action, and the first factor is therefore satisfied. *O'Brien v. Encotech Construction Services, Inc.*, 203 F.R.D. 346, 351-52 (N.D. Ill. 2001) ("[T]he court in this case has not been informed by either party of any pending suits brought by individual class members ... and thus ... there does not appear to be an interest in controlling the prosecution of the state claims.") (internal quotations omitted).

The second factor—the extent and nature of litigation already pending—militates in favor of certification. Because this MDL has consolidated proceedings against Ford, Firestone, and Bridgestone arising out of allegedly faulty Tires and Explorers, "the extent and nature of any litigation concerning the

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[42] *See, e.g., Spied v. Bridgestone/Firestone, Inc., et al.*, IP 00-5035-C-B/S (now pending in the MDL); *Davison v. Bridgestone/Firestone, Inc., et al.*, IP 00-5052-C-B/S (same); *Grant v. Bridgestone/Firestone, Inc., et al.*, Case No. 009-3668 (Pa. Ct. Cm. Pl.) (pending in Pennsylvania state court); *Burkes v. Bridgestone/ Firestone, Inc., et al.*, No. 00-026711 CZ (Wayne County Cir. Ct.) (pending in Michigan state court).

controversy already commenced by ... members of the class" is limited. The filing of the Master Complaint consolidated most of the then-existing federal class action cases. State class action lawsuits remain pending, but neither side suggests this development as a reason to deny certification here.[43]

The third factor—the desirability of concentrating the litigation in a particular forum—favors certification. We are aware that MDL consolidation, in and of itself, does not satisfy this condition. Instead, the question to be examined is whether the "concentrat[ion] of the litigation of the claims in the particular forum" should take the form of class certification. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234- 35 (9th Cir. 1996) (superiority of class certification not a foregone conclusion by virtue of multidistrict consolidation for pretrial

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[43] Firestone argues that the absence of any individual lawsuits by proposed class members demonstrates that certification here would create a "judicial 'nightmare of a class action,' " when the Tires of all such Plaintiffs "have performed perfectly [and therefore, Plaintiffs] have not been hurt by Firestone." Firestone Supp. Reply in Opp. at 11 (quoting *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001)). Our response to this argument is two-fold. First, assuming Firestone's familiarity with our earlier ruling on the motion to dismiss, Firestone apparently does not argue that Plaintiffs do not make a colorable claim of loss in the surviving causes of action. *See Bridgestone/Firestone*, 155 F. Supp.2d at 1099 (explaining that under implied warranty of merchantability, for example, Plaintiffs can suffer actionable loss absent injury to property or person). Instead, Firestone must be arguing (no more appropriately) that Plaintiffs ultimately will not succeed on the merits of their claim. *Rahim v. Sheahan*, 2001 WL 1263493, at *10 (N.D. Ill. 2001) (at class certification stage, "focus [is not] the substantive strength or weakness of the plaintiffs' claims ...") (interpreting *Szabo* and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). Second, Firestone's argument is not connected to the aim of this subsection of Rule 23. Courts generally look at the progress of litigation in other courts so as to avoid inconsistent results and duplication of effort. *Cf. Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 838 (7th Cir. 1999) (comparing progress of *Blair* litigation to overlapping class action before another judge as part of process of determining whether *Blair* class action was "superior vehicle").

proceedings). We find that it should. In our view, class certification is the most appropriate means of continuing this litigation. As Plaintiffs note, without class certification, if individual Plaintiffs wish to continue pursuing their claims,[44] either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. Supp. Memo. in Support at 19. Such a result would be immensely burdensome to the courts, parties, and witnesses. This would also create the risk of inconsistent results. And while these multitudinous lawsuits are clogging the courts, other litigants must wait and wait and wait. Thus, this factor clearly supports class certification.

The key factor in the superiority inquiry for this case, however, is the last criterion listed in Rule 23—manageability. Defendants' most strenuous objection to manageability is Plaintiffs' alleged failure to propose a workable trial plan. Opp. at 69-71; Firestone's Memo. in Resp. to Bench Book at 25-27. Defendants maintain that myriad individual issues preclude even the possibility of a workable trial plan. *E.g.*, Firestone's Supp. Reply in Opp. at 10 (more than two hundred tire populations for which individualized questions exist). As explained in the discussion of predominance, the individual issues in this case are not nearly as daunting as Defendants claim. Also, as discussed earlier, subclassing is available if certain factual distinctions appear material after fuller development of the facts. Defendants, of course, object to using subclasses as a solution to this potential issue, claiming that the sheer number of subclasses

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[44] We anticipate, of course, that most Plaintiffs would drop their claims. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. The class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quoting *Mace*, 109 F.3d at 344).

would render the class action unmanageable. *E.g.*, Opp. at 72. We are not dissuaded by this argument, however. Most of the distinctions to which Defendants refer are completely immaterial and therefore will not create the need for subclasses.[45] As noted above, legally relevant distinctions (including, for example, privity in connection with the implied warranty claims under Tennessee law) can be managed through subclassing, a procedure that commends itself in practical terms and is specifically authorized by Rule 23(c)(4)(B). *See also Williams v. Chartwell Financial Services, Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) ("The fact that Rule 23 provides for subclasses when they are efficient makes it clear that the existence of multiple subclasses, in and of itself, is not sufficient to justify the district court's denial of class certification.").

Also, contrary to Defendants' argument, Plaintiffs have succeeded in painting a picture of the proposed trial that satisfies Rule 23. Plaintiffs' Bench Book, Ex. Q (Class Trial Structure); Plaintiffs' Rebuttal Bench Book, Ex. M (Declaration of Elizabeth J. Cabraser Re: Class Action Trial Plan/Trial Structure). In this trial plan, as in the trial plan for a hypothetical individual action on these claims, certain claims (such as consumer protection and warranty claims) will be tried to the jury and other claims (unjust enrichment) will be tried to the Court. *Id.* Defendant Firestone objects, stating, "It is not sufficient to say, for example, that unjust enrichment claims can be tried to the Court. To prevail on their class motion, plaintiffs would have had to explain how

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[45] Due to our earlier choice of law decision, reaffirmed here today, this case does not involve the numerous subclasses on the basis of state law variation that plague the pursuit of class certification in many cases. *See, e.g., In re Ford Motor Co. Ignition Switch Products Liability Litig.*, 174 F.R.D. 332, 352 (D. N.J. 1997) ("As things now stand, it is apparent that appropriate adjudication of the issues in the MDL case would require an unduly large number of subclasses that would divide up the plaintiffs by, among other factors, vehicle model, model year, *and the law that governs their claims.*").

those claims could be proved, and defended, on a classwide basis, without hopelessly bogging down in unmanageable individual issues . . ." Firestone's Resp. to Bench Book at 26. We agree in principle, but this concern is the same as Defendants' argument on predominance, and we have addressed it above. Common proof constitutes the focus of evidence on unjust enrichment and other claims.[46] To round out the metaphor, Plaintiffs' "picture" is admittedly grand in scope, and quite ambitious; however, it is recognizable as a conventional trial construct, rather than as a surrealist exercise.

Likewise, the trial plan satisfies the requirements of due process and the Seventh Amendment. Defendants argue that the class trial would be so bewildering to any jury that it would violate the due process rights of Defendants and absent class members. Supp. Memo. in Opp. at 17. Alternatively, according to Defendants, the use of multiple juries to adjudicate these complex claims would violate the Seventh Amendment "right to have juriable issues determined by the first jury impaneled to

---

[46] Firestone also objects to the trial plan because it would involve bifurcation or "multifurcation," according to Firestone's view. Firestone's Resp. to Bench Book at 26. Firestone is correct to note that bifurcation would be necessary for any claims on behalf of a property damage class. Even Plaintiffs admit that the Court would need to "bifurcate any eventual trial ... between a liability phase common to all of the subclasses and an individual damages phase for each [individual] property damage subclass member." Memo. in Support at 45 n.26. However, we determined above that there will be no property damage subclass because common issues do not predominate for that subclass. The "multifurcation" to which Firestone refers consists of "separate trials for liability, for collective damages, for punitive damages from Firestone, [and] for exemplary damages from Ford." Firestone's Resp. to Bench Book at 26. Multiple "trials" on these issues are no more needed here than they would be for a hypothetical individual plaintiff pursuing all of these claims against both Ford and Firestone. In any event, bifurcation, if ultimately necessary, is permitted. *See Rhone-Poulenc,* 51 F.3d at 1303 ("[Seventh Amendment problems do] not arise when the same jury is to try successive phases of the litigation.").

hear them . . . , and not reexamined by another finder of fact." Opp. at 73-74 (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.1995)). In response, we note that juries are often faced with the responsibility to make difficult and complex decisions, yet they manage to perform admirably. We have no doubt that the jury impaneled in this case will sift through the jury instructions and evidence with full competence.[47] Furthermore, the cases cited by Defendants on this issue do not support their position. Opp. at 72 n.80. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993), *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993), and *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), were all personal injury cases, not class actions. In contrast, as we found above, common issues make up the bulk of the case, thus limiting the complexity Defendants have attempted to magnify.

Finally, Defendants argue that there are other, "superior" methods for resolving this controversy. First, they contend that continued MDL treatment, absent class certification, will significantly advance the litigation. Supp. Memo. in Opp. at 17. Obviously, however, MDL treatment can take a dispute only so far. The authorizing statute, 28 U.S.C. § 1407, allows that civil actions "may be transferred to any district for coordinated or consolidated *pretrial proceedings*." (emphasis added). Certainly, coordinated discovery and consideration of pretrial motions has been efficient so far and hopefully will continue to be, but multidistrict litigation alone is not the "superior method for the fair and efficient adjudication of the controversy." *See* Fed.R.Civ.P. 23(b)(3). Second, according to Defendants, the NHTSA process for investigating and remedying consumer complaints and alleged safety-related vehicle defects is superior

[47] Defendants' Seventh Amendment argument has no application to a case tried to a single jury.

to the class action mechanism. Opp. at 75. While we recognize the role that NHTSA plays in promoting highway safety, we also are aware that the remedies available to NHTSA are not the same as those available through the judicial process. *See In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 153 F. Supp.2d 935 (S.D. Ind. 2001). Courts should not cede their proper role to an administrative agency.

CONCLUSION

For the reasons explained above, Defendants' Motions to Reconsider our November 28, 2001 Order Certifying Classes is *DENIED.* The Court also *DENIES* Ford's Motion for Reconsideration of the Court's Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint. For similar reasons, Firestone's Motion for 28 U.S.C. § 1292 Certification of the July 27, 2001 Order is *DENIED.* Finally, Plaintiffs' Motion for Reconsideration of Ruling on the Scope of the TCPA/MCPA in July 27 Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint is *GRANTED.*

Further, it is ordered that Plaintiffs submit for approval by January 16, 2002, the proposed notice to class members and tender therewith their proposed method and schedule for disseminating said notice.

It is so ORDERED this 31st day of December 2001.

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copy to:

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Wilson Kehoe & Winingham
2859 North Meridian Street
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Daniel P. Byron
McHale Cook & Welch
320 N Meridian St
1100 Chamber of Commerce Building
Indianapolis, IN 42604

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re BRIDGESTONE/ FIRESTONE, INC. TIRES PRODUCTS LIABILITY LITIGATION,	)	IP 00-9373-C-B/S MDL No. 1373
THIS DOCUMENT RELATES TO ALL THE ACTIONS, Defendant.	)	(centralized before Hon. Sarah Evans Barker).

ORDER CERTIFYING CLASSES

Having held the hearing on class certification and having notified the parties that a ruling will issue by the end of the year, the Court rules on Plaintiffs' Motion for Class Certification at this time in aid of its jurisdiction.[1] The Court GRANTS in part and DENIES in part Plaintiff's motion. An order setting forth in full the Court's analysis of the parties' arguments on this issue

[1] It has come to our attention that a request is pending before the Circuit Court of Greenville County of South Carolina to certify a class of South Carolina owners of Explorers equipped with Firestone tires which may be ruled upon imminently.

will follow shortly. Time for appeal under Federal Rule of Civil Procedure 23(f) will begin to run on the date of the entry of the latter order or, assuming the timely filing of the motion to reconsider, on the date of a ruling on a motion to reconsider our ruling. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) ("We hold that a motion for reconsideration filed within ten days of 'an order of a district court granting or denying class action certification' defers the time for appeal until after the district judge has disposed of the motion."). Notice to the class shall be deferred until a the final order on these issues from the Court.

The Court certifies the following classes and sub-class:

EXPLORER CLASS:

All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 (the "Current Explorer Owner subclass") or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 (the "Former Explorer Owner classes").

Explorer Sub-Class:

All current residents of the United States who purchased, owned, or leased, at any time from 1990 to the present, Ford Explorers, model years 1991 through 2001, that are or were equipped with Tires (as defined below).

TIRE CLASS:

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX,

ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar[2] to Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja and Wilderness tires ("Tires").

The Court denies Plaintiffs' motion insofar as it asks for certification of a class consisting of "all current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires that failed, resulting in property damage."

It is so ORDERED this 28th day of November 2001.

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copy to:

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136 North Delaware Street
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[2] This definition incorporates the subclasses in paragraphs 1-6 of Plaintiff's Class Structure/Class Definition, filed on November 16, 2001.

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APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illnois 60604

June 5, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge.

Nos. 02-1437, 02-1438 & 02-1439

In the Matter of:	)	
BRIDGESTONE/	)	**Appeals from the**
FIRESTONE, INC.,	)	**United States**
TIRES PRODUCTS	)	**District Court for**
LIABILITY	)	**the Southern District**
LITIGATION	)	**of Indiana,**
	)	**Indianapolis**
	)	**Division**
	)	
Appeals of:	)	**No. IP 00-9373-C-**
BRIDGESTONE	)	**B/S**
FIRESTONE, INC.	)	**(MDL No. 1373)**
BRIDGESTONE	)	**Sarah Evans**
CORPORATION,	)	**Barker, *Judge.***
AND FORD	)	
MOTOR	)	
COMPANY	)	

Order

Appellee Class Plaintiffs filed a petition for rehearing and rehearing en banc on May 7, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc. * and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Chief Judge Flaum and Judge Rovner took no part in the consideration of the petition for rehearing en banc.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/ FIRESTONE, INC., ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	)	Master File No. IP 00-9373-C-B/S MDL No. 1373 (centralized before Hon. Sarah Evans Barker)
THIS DOCUMENT RELATES TO THE MASTER COMPLAINT	)	

CLASS STRUCTURE/CLASS DEFINITION

EXPLORER CLASS:

All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 (the "Current Explorer Owner subclass") or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 (the "Former Explorer Owner classes").

Source: Master Complaint ¶ 161

TIRE CLASS:

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar to Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja and Wilderness tires ("Tires").

Source: May 8, 2000 Letter from NHTSA to Robert J. Wyant, V.P. Bridgestone/Firestone, Inc.; Master Complaint ¶ 136

TIRE SUBCLASSES

1. August 2000 Firestone Recall Tires Subclass

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires subject to the August 9 Recall (Ex. A).

Source: Master Complaint ¶ 137(a); Firestone Recall

2. **NHTSA September 2000 Consumer Advisory Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to present, vehicles equipped with Tires subject to NHTSA's September 1, 2000 Consumer Advisory (Ex. B).

Source: Master Complaint ¶137(b);
NHTSA September 1, 2000 Consumer Advisory

3. **Ford Summer 2001 Owner Notification Program Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to present, vehicles equipped with Tires subject to Ford's Summer 2001 Owner Notification Program (Ex. C).

Source: Ford Owner Notification Program

4. **October 2001 NHTSA Recall Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires subject to NHTSA's October 4, 2001 Recall (Ex. D).

Source: NHTSA October 4, 2001
Engineering Analysis Report
and Initial Decision

5. **Other Common Green Tires Subclass**

All current resident of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires not part of the Subclasses 1 through 4, that Firestone has identified as "common green" ("common build and cure") to those Tires. The term "common green" means tires that are

produced to the same internal specifications, but which may be molded to different external characteristics and sold under different model designations. (Ex. E).

Source: Firestone Documents Responsive to NHTSA May 8, 2000 Request; Declaration of Gary L. Liberson (Firestone Expert); ¶ 3 & Ex. A; March 2001 Tire Preservation Order

6. **Wilderness HT Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Wilderness HT Tires.

Source: Declaration of Gary L. Liberson (Firestone Expert); ¶ 3 & Ex. A

7. **Property Damage Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires that failed, resulting in property damage.

Source: Master Complaint, ¶ 137(d)

8. **Explorer Subclass**

All current residents of the United States who purchased, owned, or leased, at any time from 1990 to the present, Ford Explorers, model years 1991 through 2001, that are or were equipped with Tires.

Source: Master Complaint, ¶ 137(e)

APPENDIX F

LIST OF INDIVIDUAL PETITIONERS

Marc Albanese
Jan Atkins
Jessie G. Atkins
Richard Atkinson
Gloria J. Arnold
Rhona Baugh-Seawright
Jerry Bielawski
Robert Blank
Jim P. Barrentine
Marianne R. Berrigan
Marey Bielawski
Marc Boutwell
Laurie Bridewell
Kenneth M. Bright
Charles Brooks
Martin Brooks
Joel Brown
Debbie Bramlett
Robert Bridewell
Larry Brooks
A. R. Brown
Roger V. Brown
Terry Brown
Jennifer L. Burge
Marvin E. Burnett
Florence Bruemmer
George Burkes, Jr.
Ronny A. Clay
Barbara Colar
Deanna & John Connell
Michael Cobb
John Collins
Pam or Case Cooper
Donna & Ralph Cordasco
Kevin Craig
Leo Cruz
Lori Cutshall
Dominic Damiano
Jason B. Daniel
Brian Davis
Joan V. Davis
Nelson Davis, III
Robert Dawson
Michael Devening
Robert Dickard
Kathe Dietzler
Michael E. Disbrow
John V. Dovich
Tom Drumwright
Leroy Eberly
Dan Edwards
Leo Ellington
George Elliot
Conrad Encarnacion

Brenda Bush
Joan M. Caden
Jamie C. Cameron
Randal Cauley, Jr.
Billy Cain
Kenneth Catrino
William Chandler
Jimmy Cheffen
Peter Choe
Margaret Clarks
Gary Clay
Charles Clark
Mary Katherine Gelston
Brian K. Gillaspy
Richard Glover
Rodger Glover
Tim Gossett
Diana Grant
John Grantham
Susan P. Grayson
Roberta Greenberg
Sheila Griffin
E. Frank Griswold, III
Gary L. Gustafson
Jennifer L. Hakker
Arthur C. Harding
Lynn Harkness
James Hartman
David C. Hays
Wayne Henson
Debra S. Hicks
Gladys Highers
Darryl Hilton
Sammy Hinson

Terry W. Etl
Harold Facemyer
Christopher S. Fawrie
Chris Fernandez
Frank Fietz
Jane Fitzharris
Daryl L. Ford
Robert Fretina
Robert Gaiennie
Jimmy Gamble
Eric E. Gasbarro
Heather M. Gaudet
Jason Lamb
Judy Latonis
Albert G. Latour
Beth M. Leahy
Kevin Leibold
~~Judy Lenoir Day~~
Fred Lester
Charlie Leuenberger
Karen Lewis
Jane Lill
Carla C. Long
Michael Louridas
Roy Majors
John Maples
Kristin Maples
Matthew Martelli
James Mathey
Mabry McBride
Susan McCormick
Brenda McGraw
David McGrew
Gene McWilliams

Cassondra Holly
Jim Holt
Terry Holt
Shelley Hotchkiss
Dex Howard
Michael Huber
Edwin Hulse
Barbara L. Jackson
Robert Jaros
Ronald D. Johnson
Thomas Johnson
Walt Johnson
Angela Jones
Ingrid R. Jordan
Deborah Kean
Bill Keller
Kurt Kellerman
Ger & Joan Kenner
Thomas J. Kerner
Greyson Knapp
Kay Kross
Carol Kusturris
Ida Lamb
Ken Powell
Donita Qualey
Michael Raim
Diane Redys
Ronald G. Rice, Jr.
Mable Richardson
Robert Rudeck
Mattie Rule
Edward Rupp
Angie Russell
Amy Sallee
Dennis Mickunas
Kevin Milkgan
Reese Mills
Winston Milonski
Charles Mize
Debbie Monroe
John V. Monsour
Florence Montanez
William Moran
Stephen J. Morris
Richard C. Moulton
Terry Mundrick
Margaret Naylor
Blair H. Nespole
Tracy Noel
Richard Olson
John Palmer
Howard M. Peregoy
Lawrence Peterson
Genette Pierce
Sue Pledger
Cheryl Porter
James Henry Powell
Kathleen Wehking
William Wehking
Lockwood Wernet
Dawn Whorl
Lawrence J. Wies
Steven Wilkerson
Bill Williams
James Williams
Larry Williams
Thomas S. Williams
Joyce Wilson

Clark Schaffer
Louis Schrader, III
Paul Sharpe
Byron Sharpe, Jr.
Stacy Shewcraft
Sei Shimoguchi
Stuart Shiner
Matthew Sibley
Esther Siewert-Sitzmore
Vernon Sikes
Allison Simmons
Ervin Smith
Richard H. Sollner
Kevin Stafford
James Stone
David Stotts
Cheryl Stuart
Mary Anne Surber
David Swafford
Sarah Swanson
Jeana Wonnacott
Shawn Wood
Tim Wooten
Max Yates
Neal Zimmerman
Acey Swearingen
Beth M. Simon
Allan Simpson
Rhonda Skinner
John A. Sommers
Joe Southern
Timothy Trouy
Rodolfo Trujillo
Jerry Tucker
Allen Vestal
Dennis Wallace
Ryan Wallace
Joseph D. Ward
Willie Webster

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the

litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re: BRIDGESTONE/ FIRESTONE, INC. ATX, ATX II AND WILDERNESS: TIRES PRODUCTS LIABILITY LITIGATION	:	Master File No. IP 00-9373-C-B/S MDL No. 1373 (centralized before Honorable Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL ACTIONS	:	

DECLARATION OF ELIZABETH J. CABRASER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, ELIZABETH J. CABRASER, declare as follows:

1. I am a partner in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, and a member of the Executive Committee for Class Plaintiffs in this matter. I have personal knowledge of the manner of preparation of the surveys attached as Exhibits to this declaration, and could competently testify thereto if called upon by the Court to do so.

2. Attached hereto as Exhibit A is plaintiffs' 51

Jurisdiction Survey of Unjust Enrichment, setting forth the common features of the Unjust Enrichment laws of all the jurisdictions within the proposed Class Definition.

3. Attached hereto as Exhibit B is plaintiffs' 51 Jurisdictions Survey: Breach of Express Warranty, establishing the commonality of the Express Warranty laws of all the jurisdictions within the proposed Class Definition.

4. Attached hereto as Exhibit C is plaintiffs' Fifty-One Jurisdiction Survey: Express Warranty Created by Advertising.

5. Attached hereto as Exhibit D is plaintiffs' survey on reliance as an element of express warranty.

6. Attached hereto as Exhibit E is plaintiffs' Chart of Jurisdictions Which Have Adopted Verbatim UCC Article 2-314 (Implied Warranty; Merchantability; Usage of Trade).

7. Attached hereto collectively as Exhibit F is plaintiffs' Summary Requirement of Privity for Breach of Implied Warranty of Merchantability, and a detailed 51 Jurisdiction Survey: Privity Requirement of the Implied Warranty of Merchantability.

8. Attached hereto as Exhibit G is plaintiffs' Chart of Jurisdictions Which Have Adopted Verbatim UCC Article 2-302 (Unconscionable Contract or Clause).

9. Attached hereto collectively as Exhibit H is plaintiffs' survey titled Consumer Fraud Laws of 51 Jurisdictions, and a summary of the Common Characteristics of Consumer Fraud Laws of 51 Jurisdictions.

10. Attached hereto as Exhibit I-A is plaintiffs' 51

Jurisdiction Analysis of Negligence/Economic Loss Rules; and I-B, Proof of Negligence: Jury Instructions at Trial.

11. Attached hereto as Exhibit J is a true and correct copy of the California Supreme Court's January 25, 2001 Opinion in Washington Mutual Bank, FA v. Superior Court, No. S070418, 2001 Cal. LEXIS 27 (also found at 2001 WL 58863 (Cal.)).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 1st day of February, 2001, at San Francisco, California.

/s/

Elizabeth J. Cabraser
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Embarcadero Center West
275 West Battery Street,
30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Alabama	Yes[1]	Yes[2]
Alaska	Yes[3]	Yes[4]
Arizona	Yes[5]	Yes[6]
Arkansas	Yes[7]	Yes[8]
California	Yes[9]	Yes[10]

1. Hancock-Hazlett Gen. Constr. Co. v. Trane Co., 499 So.2d 1385, 1387 (Ala.1986) ("The essence of the theor[y] of unjust enrichment . . . is that . . . defendant holds money which, in equity and good conscience . . . was improperly paid to defendant because of mistake or fraud.")
2. See id.; Ammons v. Coffee County, 716 So.2d 1227, 1230 (Ala. App. 1998).
3. State v. Mitchell, 930 P.2d 1284, 1288 (Alaska 1997).
4. Id.
5. Murdock-Bryant Constr., Inc. v. Pearson, 703 P.2d 1197, 1202 (Ariz. 1985).
6. Id.
7. Guar. Nat'l Ins. v. Denver Roller, Inc., 854 S.W. 2d 312, 317 (Ark. 1993) ("have received something of value, to which he was not entitled and which he must restore.")
8. See id.
9. Pollak v. Staunton, 293 P. 26, 30 (Cal. 1930)
10. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Colorado	Yes[11]	Yes[12]
Connecticut	Yes[13]	Yes[14]
District of Columbia	Yes[15]	Yes[16]
Delaware	Yes[17]	Yes[18]
Florida	Yes[19]	Yes[20]
Georgia	Yes[21]	Yes[22]

11. DCB Constr. Co., Inc. v. Cent. City Dev. Co., 965 P.2d 115, 119 (Co. 1998) (liability exists when the defendant unjustly benefitted at plaintiff's expense).
12. Id.
13. Meaney v. Conn. Hosp. Ass'n, 735 A.2d 813, 820 (Conn. 1999)
14. Id.
15. Emerine v. Yancey, 680 A.2d 1380, 1383 (D.C. App. 1996).
16. Id.
17. Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1062-63 (Del. 1988); Adams v. Jankouskas, 452 A.2d 148, 152 (Del. 1982) (fraudulent, unfair, or unconscionable conduct allows for use of unjust enrichment doctrine).
18. Id.
19. Quinn v. Phipps, 113 So. 419, 422 (Fla. 1927).
20. Id.
21. Engram v. Engram, 463 S.E.2d 12, 15 (Ga. 1995).
22. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Hawaii	Yes[23]	Yes[24]
Idaho	Yes[25]	Yes[26]
Illinois	Yes[27]	Yes[28]
Indiana	Yes[29]	Yes[30]
Iowa	Yes[31]	Yes[32]

23. Small v. Badenhop, 701 P.2d 647, 654 (Haw. 1985) (when property acquired where legal owner cannot retain it "in good conscience" court can order restitution).

24. Id.; see also DeMello v. Home Escrow, Inc., 659 P.2d 759, 764 (Haw. App. 1983).

25. Wilhite v. Northwest Yearly Meeting Pension Fund, 916 P.2d 1264, 1273 (Idaho 1996).

26. Id.; Davenport v. Burke, 167 P.481, 484 (Idaho 1917) (doctrine used where property obtained by fraud).

27. HPI Health Care Servs. Inc. v. Mt. Vernon Hosp., Inc., 545 N.E. 2d 672, 678-79 (Ill. 1989).

28. Id.

29. Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991) ("a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit . . . would be unjust").

30. Id.

31. Slade v. M.L.E. Invest. Co. v. McCoy, 566 N.W.2d 503, 506 (Iowa 1997).

32. Id.; In re Estate of Peck, 497 N.W.2d 889, 890 (Iowa 1993).

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Kansas	Yes[33]	Yes[34]
Kentucky	Yes[35]	Yes[36]
Maine	Yes[37]	Yes[38]
Maryland	Yes[39]	Yes[40]
Massachusetts	Yes[41]	Yes[42]
Michigan	Yes[43]	Yes[44]

33. Wheat v. Finney, 630 P.2d 1160, 1162-63 (Kan. 1981) ("The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to him."); Kampschroeder v. Kampschroeder, 887 P.2d 1152, 1155 (Kan. App. 1995) (unjust enrichment available for situations of fraud)
34. Ids.
35. Bryan Bros. Packing Co. v. Garrard, 386 S.W.2d 469, 474 (Ky. App. 1964)
36. Id.; see Kaplon v. Chase, 690 S.W.2d 761, 763 (Ky. App. 1985) (unjust enrichment available for fraud or other unconscionable conduct).
37. Aladdin Elec. Assoc. v. Old Orchard Beach, 645 A.2d 1142, 1144-45 (Me. 1994).
38. Id.; see Gaulin v. Jones, 481 A.2d 166, 168 (Me. 1984).
39. Mass Transit Admin. v. Granite Constr. Co., 471 A.2d 1121, 1125 (Md. App. 1984).
40. Id.
41. Nat'l Shawmut Bank v. Fidelity Mut. Life Ins. Co., 61 N.E.2d 18, 22 (Mass. 1945).
42. Id.
43. Mich. Educ. Emples. Mut. Ins. Co. v. Morris, 596 N.W.2d 142, 151 (Mich. 1999)
44. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Minnesota	Yes[45]	Yes[46]
Mississippi	Yes[47]	Yes[48]
Missouri	Yes[49]	Yes[50]
Montana	Yes[51]	Yes[52]
Nebraska	Yes[53]	Yes[54]
Nevada	Yes[55]	Yes[56]

45. Timmer v. Gray, 395 N.W.2d 477, 478 (Minn.App.1986) ("actions for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself at the expense of another").
46. Id.
47. Dew v. Langford, 666 So.2d 739, 745 (Miss. 1995).
48. Id.
49. Erslon v. Vee-Jay Cement Contracting Co., 728 S.W.2d 711, 713 (Mo. App. 1987).
50. Id.
51. Lawrence v. Clepper, 865 P.2d 1150, 1156 (Mont. 1993).
52. Id.
53. Professional Recruiters, Inc. v. Oliver, 456 N.W.2d 103, 108 (Neb. 1990).
54. Id.
55. LeasePartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997).
56. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
New Mexico	Yes[57]	Yes[58]
North Carolina	Yes[59]	Yes[60]
North Dakota	Yes[61]	Yes[62]
Ohio	Yes[63]	Yes[64]
Oklahoma	Yes[65]	Yes[66]
Oregon	Yes[67]	Yes[68]

57. Sunwest Bank, N.A. v. Colucci, 872 P.2d 346, 349 (N.M. 1994).
58. Id.
59. Booe v. Shadrick, 369 S.E.2d 554, 555-56 (N.C. 1988)
60. Id.
61. Albrecht v. Walter, 572 N.W. 2d 809, 815 (N.D. 1997).
62. Id.
63. Hambleton v. R.G. Barry Corp., 465 N.E.2d 1298, 1302 (Ohio 1984)
64. Id.
65. N.C. Coroff Partnership, Ltd. v. Oxy USA, Inc., 929 P.2d 288, 295 (Ok. App. 1996).
66. Id.
67. Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Assn., 577 P.2d 477, 491 (Ore. 1978)
68. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Pennsylvania	Yes[69]	Yes[70]
New Hampshire	Yes[71]	Yes[72]
New Jersey	Yes[73]	Yes[74]
New Mexico	Yes[75]	Yes[76]
New York	Yes[77]	Yes[78]
North Carolina	Yes[79]	Yes[80]

69. Sack v. Feinman, 432 A.2d 971, 974 (Pa. 1981)
70. Id.
71. Della Windows and Doors, Inc. v. Faraci, 580 A.2d 732, 732-33 (N.H. 1990).
72. Id.
73. Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 75 (N.J. 1985).
74. Id.
75. Sunwest Bank, N.A. v. Colucci, 872 P.2d 346, 348 (N.M. 1994).
76. Id.
77. Sharp v. Kosmalski, 351 N.E.2d 721, 724 (N.Y. 1976).
78. Id.
79. Embree Constr. Group, Inc. v. Rafcor, Inc., 411 S.E.2d 916, 923 (N.C. 1992)
80. Id.

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Exhibit "A"

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Pennsylvania	Yes[81]	Yes[82]
Rhode Island	Yes[83]	Yes[84]
South Carolina	Yes[85]	Yes[86]
South Dakota	Yes[87]	Yes[88]
Tennessee	Yes[89]	Yes[90]
Texas	Yes[91]	Yes[92]

81. Wingert v. J. W. Phillips Gas & Oil Co., 157 A.2d 92, 96 (Pa. 1959).
82. Id.
83. Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors, 589 A.2d 1201, 1202 (R.I. 1991).
84. Id.
85. Harper v. McCoy, 276 S.E.2d 782, 783-84 (S.C. 1981).
86. Id.
87. McFarland v. McFarland, 470 N.W. 2d 849, 851 (S.D. 1991).
88. Id.
89. Browder v. Hite, 602 S.W.2d 489, 491 (Tenn. App. 1980).
90. Id.
91. Bryan v. Citizens Nat'l Bank, 628 S.W.2d 761, 763 (Tex. 1982).
92. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Vermont	Yes[93]	Yes[94]
Virginia	Yes[95]	Yes[96]
Washington	Yes[97]	Yes[98]
West Virginia	Yes[99]	Yes[100]
Wisconsin	Yes[101]	Yes[102]

93. Brookside Mem., Inc. v. Barre City, 702 A.2d 47, 50 (Vt. 1997) ("The inquiry is whether, in light of the totality of the circumstances, equity in good conscience demands that the defendant return that which the plaintiff seeks to recover.")

94. Id.

95. City of Norfolk v. Norfolk County, 120 Va. 356, 364, 91 S.E. 820 (Va. 1917) ("where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff" unjust enrichment exists).

96. Id.

97. Hoffer v. State of Washington, 755 P.2d 781, 792 (Wash. 1988) ("[U]nder Washington law, party must make restitution when it has been unjustly enriched at the expense of another. A party is enriched if it has received a benefit, which includes any form of advantage, including being saved from a loss.")

98. Id.

99. Dunlap v. Hinkle, 317 S.E. 2d. 508, 512 (W.V. 1984) ("Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.") (internal quotation omitted); Timberlake v. Heflin, 379 S.E. 2d 149, 155 (W.V. 1989) (remedy for unjust enrichment where property acquired by fraud, or it is inequitable to retain it).

100. Ids.

101. Mgmt. Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co., 557 N.W. 2d 67, 79 (Wis. 1996).

102. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Wyoming	Yes[103]	Yes[104]

103. Cross v. Berg Lumber Co., 7 P.3d 922, 934 (Wyo. 2000).

104. Id.

EXHIBIT B

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting UCC § 2-313
Alabama	Ala. Code 7-2-313 (Michie 2000)
Alaska	Alaska Stat. § 45.02.313 (2000)
Arizona	Ariz. Rev. Stat. Ann. § 47-2313 (2000)
Arkansas	Ark. Code Ann. 4-2-313 (2000)
California	Cal. Com. Code § 2313 (2001)
Colorado	Colo Rev. Stat. § 4-2-313 (2000)
Connecticut	Conn. Gen. Stat. 42a-2-313 (1999)
Delaware	6 Del. Code Ann.§ 2-313 (2000)
District of Columbia	D.C. Code § 28:2-313 (2000)
Florida	Fla. Stat. § 672.313 (2000)
Georgia	Ga. Code Ann. § 11-2-313 (2000)
Hawaii	Haw. Rev. Stat. § 490:2-313 (Michie 2000)
Idaho	Idaho Code § 28-2-313 (2000)
Illinois	810 Ill. Comp. Stat. Ann. 5/2-313 (2000)
Indiana	Ind. Code Ann. 26-1-2-313 (Burns 2000)
Iowa	Iowa Code Ann. 554.2313 (1999)
Kansas	Kan. Stat. Ann. 84-2-313 (1999)

[1] All jurisdictions (except Louisiana) have expressly adopted UCC § 2-313 governing express warranties. U.C.C. section 2-313 provides that express warranties by the seller are created by: (1) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. These sections are virtually the same in all 51 jurisdictions.

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting UCC §2-313
Kentucky	Ky. Rev. Stat. Ann. 355.2-313 (2000)
Louisiana	La. Rev. Stat. 9:2800.53(6) (2000)
Maine	11 Me. Rev. Stat. Ann § 2-313 (1999)
Maryland	Md. Com. Law Code Ann. § 2-313 (1999)
Massachusetts	Mass. Ann. Laws ch. 106, § 2-313 (2000)
Michigan	Mich. Stat. Ann. § 19.2313 (2000)
Minnesota	Minn. Stat. § 336.2-313 (2000)
Mississippi	Miss. Code Ann. § 75-2-313 (2000)
Missouri	Mo. Rev. Stat. § 400.2-313 (1999)
Montana	Mont. Code Ann. § 30-2-313 (2000)
Nebraska	Neb. Rev. Stat. (U.C.C.) § 2-313 (2000)
Nevada	Nev. Rev. Stat. § 104.2313 (2000)
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-313 (2000)
New Jersey	N.J. Stat. § 12A:2-313 (2000)
New Mexico	N.M. Stat. Ann. § 55-2-313 (2000)
New York	N.Y.C.L.S. U.C.C. § 2-313 (2000)
North Carolina	N.C. Gen. Stat. § 25-2-313 (2000)
North Dakota	N.D. Cent. Code § 41-02-30 (2000)

[2] Louisiana provides a statutory definition of express warranty quite similar to that in the U.C.C.:
"'Express warranty' means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that reprsents, affirms or promises that the product or its nature, material or workmanship possesses specified chracteristics or qualities or will meet a specified level of performance. 'Express warranty' does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty."
La. Rev. Stat. 2800.53(6).

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting U.C.C. § 2-313
Ohio	Ohio Rev. Code Ann. 1302.26 (Anderson 2000)
Oklahoma	12A Okla. Stat. § 2-313 (1999)
Oregon	Or. Rev. Stat. § 72.3130 (1999)
Pennsylvania	13 Pa. Stat. Ann. § 2313 (2000)
Rhode Island	R.I. Gen. Laws § 6A-2-313 (2000)
South Carolina	S.C. Code Ann. § 36-2-313 (1999)
South Dakota	S.D. Codified Laws § 57A-2-313 (2000)
Tennessee	Tenn. Code Ann. § 47-2-313 (2000)
Texas	Tex. Bus. & Com. Code § 2.313 (2000)
Utah	Utah Code Ann. § 70A-2-313 (2000)
Vermont	9A Vt. Stat. Ann. § 2-313 (2000)
Virginia	Va. Code Ann. § 8.2-313 (2000)
Washington	Wash. Rev. Code § 62A.2-313 (2000)
West Virginia	W. Va. Code § 46-2-313 (2000)
Wisconsin	Wis. Stat. § 402.313 (1999)
Wyoming	Wyo. Stat. § 34.1-2-313 (2000)

EXHIBIT C

FIFTY-ONE JURISDICTION SURVEY: EXPRESS WARRANTY CREATED BY ADVERTISING

Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
Alabama	Ricwil, Inc. v. S.L. Pappas & Co., 599 So.2d 1126, 1131 (1992)	✓
Alaska	No case law on point	Open question
Arizona	Eck v. Helene Curtis Industries, Inc., 453 P.2d 366, 369 (Ct. App. 1969)	✓
Arkansas	Ciba-Geigy Corp. v. Alter, 834 S.W. 2d 136, 146-147 (1992)	✓
California	Anthony v. GM Corp., 109 Cal. Rptr. 254 (1973)	✓
Colorado	American Safety Equipment Corp. v. Winkler, 640 P.2d 216, 220-21 (1982)	✓
Connecticut	Hamon v. Digliani, 174 A.2d 294, 297 (1961)	✓
Delaware	Mullen v. Alarmguard of Delmarva, Inc., 1992 Del. Super. LEXIS 224, *4 (1992); overruled on other grounds, 625 A. 2d 258 (1993)	✓
District of Columbia	W.G. Cornell Co. of Washington, D.C. v. Ceramic Coating Co., Inc., 626 F.2d 990, 992 n.1	✓
Florida	State Farm Insurance Co. v. Nu Prime Roll-A-Way of Miami, Inc., 557 So.2d 107 (Ct. App. 1990)	✓
Georgia	Stewart v. Gainesville Gas Co., Inc., 212 S.E. 2d 377, 378 (1975) (Ingram, J., dissent)	✓
Hawaii	No case law on point	Open question
Idaho	Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 71 (1983)	✓
Illinois	Connick v. Suzuki Motor Co., 656 N.E.2d 170, 177 (Ct. App. 1995); vacated and remanded on other grounds sub. nom 660 N.E. 2d 1267 (1995)	✓
Indiana	Prairie Production, Inc. v. Agchem Division - Pennwalt Corp., 514 N.E.2d 1299, 1302-03 (Ct. App. 1987)	✓
Iowa	Midland Forge, Inc. v. Letts Industries, Inc., 395 F. Supp. 506, 511 (N.D. Iowa 1975)	✓
Kansas	Scheuler v. Aamco Transmissions, Inc., 571 P.2d 48, 51 (1977)	✓
Kentucky	King v. Ohio Valley Terminix Co., 214 S.W. 2d 993, 996 (1948)	✓

FIFTY-ONE JURISDICTION SURVEY: EXPRESS WARRANTY CREATED BY ADVERTISING		
Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
Louisiana[1]	Walton v. Katz and Besthoff, Inc., 77 So.2d 563, 564 (1955)	✓
Maine	McNally v. Nicholson Manufacturing Co., 313 A.2d 913, 920 (1973)	✓
Maryland	Lowe v. Sporicidin Intl., 47 F.3d 124, 132 (4th Cir. 1995)	✓
Massachusetts	Hannon v. Original Gunite Aquatech Pools, Inc., 434 N.E. 2d 611, 617 (1982)	✓
Michigan	Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254, 258 (6th Cir. 1960)	✓
Minnesota	Baumgartner v. Glesner, 214 N.W. 27, 28 (1927)	✓
Mississippi	Taylor v. Ward, 393 So.2d 1342, 1346 (1981)	✓
Missouri	Interco Inc. v. Randustrial Corp., 533 S.W. 2d 257, 262 (Ct. App. 1976)	✓
Montana	Whitaker v. Farmhand, Inc., 567 P.2d 916, 920 (1977)	✓
Nebraska	Hawkins Construction Co. v. Matthews Co., Inc., 209 N.W. 2d 643, 653 (1973), overruled in part, Nat'l. Crane Corp. v. Ohio Steel Cube Co., 332 N.W. 2d 39 (1983)	✓
Nevada	No case law on point	Open question
New Hampshire	Chellman v. Saab-Scania AB, 637 A. 2d 148, 153 (1993)	✓
New Jersey	Henningsen v. Bloomfield Motors, Inc., 161 A. 2d 69, 84 (1960)	✓
New Mexico	Vitro Corp. of America v. Texas Vitrified Supply Co., 376 P.2d 41, 46 (1962)	✓
New York	Eddington v. Dick, 386 N.Y.S.2d 180, 181 (City Ct. 1976)	✓
North Carolina	Kinlaw v. Long Manufacturing N.C., Inc., 259 S.E. 2d 552, 557 (1979)	✓
North Dakota	Haugen v. Ford Motor Co., 219 N.W. 2d 462, 466 (1974)	✓

[1] Louisiana provides a statutory definition of express warranty:

"'Express warranty' means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance. 'Express warranty' does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty."

La. Rev. Stat. 2800.53(6) (1996).

[illegible] ON JURISDICTION'S STATE'S EXPRESS WARRANTY CREATED BY ADVERTISING		
Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
[illegible]	Inglis v. American Motors Corp., 209 N.E. 2d 583, 589 (1965)	✓
[illegible]	No case law on point	Open question
[illegible]	Newman v. Tualatin Development Co., 597 P.2d 800, 803 (1979)	✓
[illegible]	Klages v. General Ordnance Equipment Corp., 367 A.2d 304, 308 (1976)	✓
[illegible]	Salk v. Alpine Ski Shop, 342 A.2d 622, 626 (1975)	✓
[illegible]	Campus Sweater and Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 94 (D.S.C. 1979)	✓
[illegible]	Drier v. Perfection, Inc., 259 N.W. 2d 496, 502 (1977),	✓
[illegible]	Ford Motor Co. v. Lonan, 398 S.W. 2d 240, 242 (1966), overruled in part sub nom., First Nat'l Bank v. Brooks Farms, 821 S.W. 2d 925 (1991)	✓
[illegible]	Appleby v. Hendrix, 673 S.W. 2d 295, 297 (Ct. App. 1984)	✓
[illegible]	State v. GAF Corp., 760 P2d 310, 315 (1988)	✓
[illegible]	Taylor v. Alfarna, 481 A.2d 1059, 1060 (1984)	✓
[illegible]	Carney v. Sears, Roebuck & Co., 309 F.2d 300, 304 (4th Cir. 1962)	✓
[illegible]	Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc., 831 P.2d 724, 731 (1992)	✓
[illegible]	Dawson v. Canteen Corp., 212 S.E. 2d 82, 84 (1975)	✓
[illegible]	Hellenbrand v. Bowar, 114 N.W. 2d 418, 422 (1962)	✓
[illegible]	Walters v. Grand Teton Crest Outfitters, Inc., 804 F. Supp. 1442, 1446 (1992)	✓

EXHIBIT D

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
Jurisdiction	Case Cite	Yes/No
Alabama	Winston Indus., Inc. v. Stuyvesant Ins. Co., Inc., 317 So.2d 493, 496-97 (Ala. App. 1975).	No
Alaska	No case law requiring plaintiff to prove reliance.	No
Arizona	Downs v. Shouse, 501 P.2d 401 (Az. App. 1972) (reliance only relevant where defect is patently obvious).	No
Arkansas	Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136 (Ark. 1992).	Yes
California	Hauter v. Zogarts, 534 P.2d 377, 383-84 (Cal. 1975).	No
Colorado	No case law requiring plaintiff to prove reliance.	No
Connecticut	No case law requiring plaintiff to prove reliance.	No
Delaware	Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 659 (Del. Sup. Ct. 1984).	No
District of Columbia	No case law requiring plaintiff to prove reliance.	No
Florida	Carter Hawley Hale Stores, Inc. v. Conley, 372 So.2d 965 (Fla. App. 1979).	No
Georgia	No case law requiring plaintiff to prove reliance.	No
Hawaii	No case law requiring plaintiff to prove reliance.	No
Idaho	Jensen v. Seigel Mobile Homes, 668 P.2d 65, 70-71 (Idaho 1983).	No
Illinois	Corvell v. Lombard Lincoln-Mercury, 544 N.E. 2d 1154 (Ill. App. 1989).	Yes
Indiana	Shambaugh v. Lindsay, 445 N.E.2d 124, 126-27 (Ind. App. 1983).	No
Iowa	Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).	Yes
Kansas	Young & Cooper, Inc. v. Vestring, 521 P.2d 281, 291 (Kan. 1974).	No
Kentucky	No post-adoption of UCC case law requiring plaintiffs to prove reliance.	No

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
Jurisdiction	Case Site	Yes/No
Louisiana	No case law requiring plaintiff to prove reliance.	No
Maine	Phillips v. Ripley & Fletcher Co., 541 A.2d 946 (Me. 1988).	Yes
Maryland	No post-adoption of U.C.C. case law requiring plaintiffs to prove reliance.	No
Massachusetts	No case law requiring plaintiff to prove reliance.	No
Michigan	No case law requiring plaintiff to prove reliance.	No
Minnesota	Saunders v. Cowl, 277 N.W. 12 (Minn. 1938).	No
Mississippi	No case law requiring plaintiff to prove reliance.	No
Missouri	Interco Inc. v. Randustrial Corp., 533 S.W.2d 257, 261-62 (Mo. App. 1976).	No
Montana	Glacier General Assurance Co. v. Casualty Indemnity Exchange, 435 F. Supp. 855, 860 (D. Mon. 1977).	No
Nebraska	Hawkins Construction Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973), overruled in part on other grounds, National Crane Corp. v. Ohio Steel Tube Co., 332 N.W.2d 39 (Neb. 1983).	No
Nevada	Allied Fidelity Ins. Co. v. Pico, 656 P.2d 849, 850 (Nev. 1983).	No
New Hampshire	Werner v. Montana, 378 A.2d 1130, 1136 (N.H. 1977).	No
New Jersey	Gladden v. Cadillac Motor Car Division, 416 A.2d 394, 396 (N.J. 1980).	No
New Mexico	C.R. Anthony Co. v. Loretto Mall, 817 P.2d 238, 246 (N.M. 1991).	No
New York	CBS, Inc. v. Ziff-Davis Publishing Co., 553 N.E.2d 997, 1001 (N.Y. 1990); Ainger v. Michigan General Corp., 476 F. Supp. 1209, 1224-25 (S.D.N.Y. 1979), aff'd 632 F.2d 1025 (2d Cir. 1980).	No
North Carolina	Kinlaw v. Long Mfg. N.C., Inc., 259 S.E.2d 552, n.7 (N.C. 1978).	No

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
[illegible]	[illegible]	[illegible]
North Dakota	No case law requiring plaintiff to prove reliance.	No
Ohio	Pratt v. Bowling, No. CA-489 Slip. Op. (Ohio App. 1983).	No
Oklahoma	Thompson v. Peters, 885 P.2d 686 (Ok. Ct. of App. 1994).	Yes
Oregon	Newman v. Tualatin Dev. Co., 597 P.2d 800 (Or. 1978).	Yes
Pennsylvania	Sessa v. Riegle, 427 F. Supp. 760, 766 (E.D. Penn. 1977), aff'd w/o opp., 568 F.2d 770 (3d Cir. 1978).	No
Rhode Island	Thomas v. Amway Corp., 488 A.2d 716 (R.I. 1985).	Yes
South Carolina	No case law requiring plaintiff to prove reliance.	No
South Dakota	Schmaltz v. Nissen, 431 N.W.2d 657 (S.D. 1988).	Yes
Tennessee	No case law requiring plaintiff to prove reliance.	No
Texas	Harris Packaging Corp. v. Baker Concrete Const. Co., 982 S.W.2d 62 (Tex. App. 1998).	Yes
Utah	Mgmt. Comm. v. Graystone Pines, Inc., 652 P.2d 896, 899 (Utah 1982).	Yes
Vermont	No case law requiring plaintiff to prove reliance.	No
Virginia	Daughtrey v. Ashe, 413 S.E.2d 336, 338-39 (Va. 1992).	No
Washington	Butcher v. Garrett-Enumclaw Co., 581 P.2d 1352 (Wa. App. 1978).	No
West Virginia	No case law requiring plaintiff to prove reliance.	No
Wisconsin	Ewers v. Eisenzopf, 276 N.W.2d 802, 805 (Wisc. 1979).	No
Wyoming	No case law requiring plaintiff to prove reliance.	No

EXHIBIT E

CHART OF JURISDICTIONS WHICH HAVE ADOPTED VERBATIM UCC ARTICLE 2-314

UCC ARTICLE 2-314
IMPLIED WARRANTY; MERCHANTABILITY; USAGE OF TRADE

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

JURISDICTION	UCC ARTICLE 2-314
Alabama	Ala. Code 7-2-314 (see footnote)
Alaska	Alaska Stat. 7-2-314 (see footnote)
Arizona	Ariz. Rev. Stat. Ann. 47-2314 ("service" used instead of "serving")
Arkansas	Ark. Code Ann. 2314
California	Cal. Com. Code 2314
Colorado	Colo. Rev. Stat. 4-2-314 (uses additional comma)
Connecticut	Conn. Gen. Stat. 42a-2-314
Delaware	Del. Code Ann. tit. 6, 2-314
District of Columbia	D.C. Code Ann. 28:2-314 ("or" used instead of "other")
Florida	Fla. Stat. 672.314
Georgia	Ga. Code Ann. 11-2-314 (inserts the word "Code"; uses an additional comma)
Hawaii	Haw. Rev. Stat. 490:2-314
Idaho	Idaho Code 28-2-314
Illinois	Ill. Comp. Stat. Ann. Ch. 810, 5/2-314
Indiana	Ind. Code Ann. 26-1-2-314 (uses additional comma)
Iowa	Iowa Code Ann. 554.2314
Kansas	Kan. Stat. Ann. 84-2-314
Kentucky	Ky. Rev. Stat. Ann. 355.2-314
Louisiana	*Did Not Adopt*
Maine	Me. Rev. Stat. Ann. tit. 11, 2-314
Maryland	Md. Code Ann., Com. Law 2-314 (see footnote)
Massachusetts	Mass. Ann. Laws ch. 106, 2-314
Michigan	Mich. Stat. Ann. 440.2314
Minnesota	Minn. Stat. 336.2-314
Mississippi	Miss. Code Ann. 75-2-314 (see footnote, one less comma used)

Missouri	Mo. Rev. Stat. 400.2-314
Montana	Mont. Code Ann. 30-2-314
Nebraska	Neb. Rev. Stat. (U.C.C.) 2-314
Nevada	Nev. Rev. Stat. 104.2314
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-314
New Jersey	N.J. Stat. 12A:2-314
New Mexico	N.M. Stat. Ann. 55-2-314
New York	N.Y. U.C.C. Law 2-314
North Carolina	N.C. Gen. Stat. 25-2-314
North Dakota	N.D. Cent. Code 41-02-31
Ohio	Ohio Rev. Code Ann. 1302.27
Oklahoma	Okla. Stat. tit. 12A, 2-314
Oregon	Or. Rev. Stat. 72.3140
Pennsylvania	Pa. Stat. Ann. tit. 13, 2314
Rhode Island	R.I. Gen. Laws 6A-2-314
South Carolina	S.C. Code Ann. 36-2-314
South Dakota	S.D. Codified Laws 57A-2-314
Tennessee	Tenn. Code Ann. 47-2-314
Texas	Tex. Bus. & Com. Code Ann. 2.314
Utah	Utah Code Ann. 70A-2-314
Vermont	Vt. Stat. Ann. tit. 9A, 2-314
Virginia	Va. Code Ann. 8.2-314
Washington	Wash. Rev. Code 62A.2-314
West Virginia	W. Va. Code 46-2-314
Wisconsin	Wis. Stat. 402.314
Wyoming	Wyo. Stat. 34.1-2-314

Additions to State Jurisdictions UCC Article 2-314

Alabama and Alaska have adopted a section (labeled Section 4), which provides as follows:

(4) Procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing, or transplanting any of them in the human body in declared for all purposes to be the rendition of a service by every person participating therein and whether any remuneration is paid therefor is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives, or other human tissues.

Maryland has adopted two subsections to Section 1 (labeled A and B), which provide as follows:

(A) In §§ 2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman of the retailer; and
(B) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

Maryland has adopted Section 4, which provides as follows:

(4) Subsections (1) and (2) of this section apply to a lease of goods and a bailment for hire of goods that pass through the physical possession of and are maintained by the lessor, sublessor, or bailor.

Mississippi has adopted Section 4, which provides as follows:

(4) With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

Mississippi has adopted Section 5, which provides as follows:

(5) Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

SUMMARY OF REQUIREMENT OF PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

JURISDICTIONS REQUIRING PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY		JURISDICTIONS WHERE PRIVITY IS NOT REQUIRED FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY	
Alabama	Wisconsin	Alaska	Montana
Arizona		Arkansas	Nebraska
California		Colorado	Nevada
Connecticut		Delaware	New Hampshire
Georgia		District of Columbia	New Jersey
Idaho		Florida	New Mexico
Illinois		Hawaii	North Carolina
Kansas		Indiana	North Dakota
New York		Iowa	Oklahoma
Ohio		Kentucky	Pennsylvania
Oregon		Maine	South Carolina
Rhode Island		Maryland	South Dakota
Tennessee		Massachusetts	Virginia
Texas		Michigan	West Virginia
Utah		Minnesota	Wyoming
Vermont		Mississippi	
Washington		Missouri	

EXHIBIT F

SUMMARY OF REQUIREMENT OF PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

JURISDICTIONS REQUIRING PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY		JURISDICTIONS WHERE PRIVITY IS NOT REQUIRED FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY	
Alabama	Wisconsin	Alaska	Montana
Arizona		Arkansas	Nebraska
California		Colorado	Nevada
Connecticut		Delaware	New Hampshire
Georgia		District of Columbia	New Jersey
Idaho		Florida	New Mexico
Illinois		Hawaii	North Carolina
Kansas		Indiana	North Dakota
New York		Iowa	Oklahoma
Ohio		Kentucky	Pennsylvania
Oregon		Maine	South Carolina
Rhode Island		Maryland	South Dakota
Tennessee		Massachusetts	Virginia
Texas		Michigan	West Virginia
Utah		Minnesota	Wyoming
Vermont		Mississippi	
Washington		Missouri	

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Alabama	"While Alabama's version of U.C.C. § 2-318 has abolished privity requirements in actions involving injuries to natural persons, the privity requirements still remains in cases of strictly economic injury." State Farm Fire & Cas. Co. v. J.B. Plastics, Inc., 505 So.2d 1223, 1227 (Ala. 1987).	
Alaska		"There is no longer any requirement in Alaska that privity exist between the buyer and seller for recovery of property damage or economic loss under breach of warranty theory." Shooshanian v. Wagner, 672 P.2d 455, 462 (Alaska 1983)(citing Morrow v. New Moon Homes, 548 P.2d 279, 288-89 (Alaska 1976)).
Arizona	"As to these warranties [under § 2-314 (1)], we hold that lack of privity does preclude recovery." Flory v. Silvercrest Indus., Inc., 633 P.2d 383, 387 (Ariz. 1981).	
Arkansas		"In recovery for breach of implied warranty of merchantability, the plaintiff must prove… that he was a person whom the defendant might reasonably expect to use or be affected by the product." E.I. Du Pont De Nemours & Co. v. Dillaha, 659 S.W. 2d 756, 758 (Ark. 1983).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
California	"On the matter of liability under a breach of warranty theory, . . . privity between the plaintiffs and defendants remains a requirement for actions based upon the implied warranty of merchantability." Rodrigues v. Campbell Indus., 87 Cal. App. 3d 494, 500 (Cal. Ct. App. 1978).	
Colorado		"Because lack of privity no longer presents an obstacle to recovery for breach of implied warranty, an action may lie against the blood bank on that theory." Hansen v. Mercy Hosp., 570 P.2d 1309, 1311 (Colo. Ct. App. 1977) (citing § 4-2-318, C.R.S. 1973; Hiigel v. Gen. Motors Corp., 544 P.2d 983 (Colo. 1975)).
Connecticut	"In his complaint, the plaintiff alleged that Dodge acted as an agent for Chrysler and that the implied warranty of merchantability thus ran against or was imputed by Chrysler . . . . This being so, a privity of contract between the parties must be shown." Koellmer v. Chrysler Motors Corp., 276 A.2d 807, 812 (Conn. Cir. Ct. 1970).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Delaware		"By analogy, Dillion is support for the proposition that just as the privity requirement has been abandoned in personal injury actions where the item is inherently dangerous, so should the privity requirement be abandoned in actions for economic injury where the good is inherently defective." Pack & Process, Inc. v. The Celotex Corp., 503 A.2d 646, 660 (Del. Super.Ct. 1985) (citing Dillion v. Gen. Motors Corp., 315 A.2d 732 (Del. Super. 1974)) "The Court is of the opinion that the concern of the authors of the Delaware Study Comment to 6 Del. C. § 2-318 that ultimate consumers of defective goods not be left without recovery against remote manufacturers, wholesalers and other vendors justifies such a conclusion." Id. (quoting 6 Del. C. § 2-318 at 59.).
District of Columbia		"One statement should be made at the outset about which there must be no confusion--the District of Columbia is a jurisdiction affording recovery for tortious injury to the ultimate consumer--whether sought under a theory of strict liability or implied warranty. Bowler v. Stewart-Warner Corp., 563 A.2d 344,345 (D.C. 1989).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Florida		"[W]e conclude that neither the absence of privity between the manufacturer and a purchaser such as Manheim, nor the execution of a written warranty agreement between the manufacturer and its dealer of the kind hereinbefore appearing operates to preclude recovery on the basis of implied warranty of a product due to its defects and lack of fitness and suitability." Manheim v. Ford Motor Co., 201 So.2d. 440, 442 (Fla. 1967). "Therefore … the Court concludes that under present Florida law one party may sue another in the distributive chain for breach of warranty notwithstanding lack of privity, even where the injury suffered is a mere economic disappointment." Autrey v. Chemitrust Indus. Corp., 362 F.Supp. 1085, 1092 (D. Del. 1973)
Georgia	"Even if an implied warranty were not excluded by the terms of the express warranty there could be no recovery by Halco because of a lack of privity between it and General Motors." Gen. Motors Corp. v. Halco Instruments, Inc., 185 S.E.2d 619, 622 (Ga. Ct. App. 1971).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Hawaii		"Section 490:2-318, Hawaii's enactment of UCC § 2-318, abolishes the defense of privity to an action for breach of warranty." GKW Electronics, Inc. v. Zenith Electronics Corp., 967 F.2d 586, No. 91-15791, 1992 WL 158882, at *2 (9th Cir. 1992).
Idaho	"Courts and commentators making the distinction between tort and contract recognize that privity of contract is necessary in a contract action for breach of implied warranty." Salmon Rivers Sportsman Camps v. Cessna Aircraft Co., 544 P.2d 306, 311 (Idaho 1975). "We agree with Professor Prosser's quoted statements and the cases listed above, and conclude that privity of contract is required in a contract action to recover economic loss for breach of implied warranty." Id. at 312.	
Illinois	"Before proceeding to the specifics of plaintiff's appeal, we affirm the directed verdict for Subaru on Count II of the third amended complaint, alleging a breach of Subaru's implied warranty of merchantability under section 2-314 of the Code (Ill. Rev. Stat. 1985, ch. 26, par. 2-314). We base that affirmance on the lack of contractual privity between plaintiff and Subaru." Tokar v. Crestwood Imports, Inc., 532 N.E.2d 382, 700 (Ill. App. Ct. 1988).	
		"Indiana has adhered to the general rule that implied

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Indiana		warranties, as they relate to economic loss from the bargain, cannot ordinarily be sustained between the buyer and a remote manufacturer." Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1301 (Ind. Ct. App. 1987). "An exception to [the privity] rule allows a suit in implied warranty despite lack of privity when the contractual arrangements between the manufacturer and the dealer create an agency relationship, and where it is further shown that the manufacturer's agents participated significantly in the sale by means of advertising and personal contact with the buyer." Sanco, Inc. v. Ford Motor Co., 579 F.Supp. 893, 899 (S.D. Ind. 1984) (citing Thompson Farms v. Corno Feed Products, 366 N.E.2d 3 (Ind. Ct. App. 1977).
Iowa		"Defendant's argument that there was no privity of contract is unavailing since, under Iowa law, the requirement of privity has been abandoned." Hardman v. Helene Curtis Indus., Inc., 198 N.E.2d 681, 691 (Ill. App. Ct. 1964).
Kansas	"We conclude implied warranties of fitness and merchantability are not extended to a remote seller or manufacturer of an allegedly defective product, which is not inherently dangerous, for only economic loss suffered by a buyer who is not in contractual privity with the remote seller or manufacturer." Professional Lens Plan, Inc. v.	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
	Polaris Leasing Corp., Impact Sys., 675 P.2d 887, 898-99 (Kan. 1984)	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Kentucky		"We think we would do no judicial violence to hold that the law in this jurisdiction is that privity is not a prerequisite to maintenance of an action for breach of implied warranty in products liability cases, upon the authority and reasoning enunciated in Henningsen v. Bloomfield Motors." Dealers Transport Co. v. Battery Distrib. Co., Inc., 402 S.W.2d 441, 446 (Ky. 1965) (citing Henningsen v. Bloomfield Motors, , 161 A.2d 69, (N.J. 1960)).
Louisiana	Did not adopt UCC	Did not adopt UCC
Maine		"In Maine, '[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods for breach of warranty, express or implied, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.'" Sullivan v. Young Brothers & Co., 91 F.3d 242, 249-50 (1st Cir. 1996)(quoting, ME. REV. STAT. ANN. tit. 11, § 2-318 (West 1999)).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Maryland		"Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer." MD. CODE. ANN., sales § 2-314
Massachusetts		"Does the lack of privity bar recovery? It does not. The fundamental purpose of §2-318, as amended, is to eliminate lack of privity as a defense in a breach of warranty action." Cameo Curtains, Inc. v. Philip Carey Corp., 416 N.E.2d 995, 998 (Mass. App. Ct. 1981).
Michigan		"This and later cases put Michigan in the forefront of those states which do not require privity for actions on implied warranty." Serjanina v. Assn. Material and Supply Co., 151 N.W.2d 345 (Mich. Ct. App. 1967).
Minnesota		"[U]nder Minnesota law a seller's implied warranty of merchantability extends to a purchaser such as IGI despite the absence of privity of contract . . . ." Indus. Graphics, Inc. v. Asashi Corp., 485 F. Supp. 793, 800 (D. Minn. 1980).
Mississippi		"Therefore, we are of the opinion that a seller is responsible for the economic loss which results from his breach of an implied warranty of merchantability without regard to privity." Volkswagen of Am., Inc. v. Novak, 418 So.2d 801, 803 (Miss. 1982).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Missouri		"Broadmoor may, however, maintain an action for economic loss on an implied warranty theory under Mo. Rev. Stat § 400.2-314 & 400.2-315, even though it is not in privity with Otis." Collegiate Enter., Inc. v. Otis Elevator Co., 650 F. Supp. 116, 118 (E.D. Mo. 1986).
Montana		"The privity requirement was abolished in Montana and a remote manufacturer may be liable for breach of implied warranties." Streich v. Hilton-Davis, 692 P.2d 440, 448 (Mont. 1984) (citing Whitaker v. Farmhand, Inc., 567 P.2d 916 (Mont. 1977)).
Nebraska		"However, the existence of an implied warranty of merchantability does not depend upon privity between Chicago Lumber and the joint venture partnership." Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd., 506 N.W.2d 706, 713 (Neb. 1993) (citing Peterson v. North Am. Plant Breeders, 354 N.W.2d 625 (Neb. 1984)).
Nevada		"Instead, we believe that lack of privity between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties." Hiles Co. v. Johnston Pump Co., 560 P.2d 154, 157 (Nev. 1977).
New Hampshire		"Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
		was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods." N.H. REV. STAT. ANN. § 382-A:2-318.

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
New Jersey		"We hold also that the buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties." Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660, 663 (N.J. 1985). "[A] plaintiff in a suit for breach of warranty against a remote seller, like a plaintiff in a strict liability action, need not establish privity with or negligence by the defendant." Id. at 676. "We conclude that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer." Id. at 674.
New Mexico		"We hold that defendant may be held liable for breach of implied warranty of merchantability under the UCC without regard to privity of contract between defendant and either plaintiff or her surgeon." Perfetti v. McGhan Medical, 662 P.2d 646, 655 (N.M. Ct. App. 1983).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
New York	"Futhermore, because it sustained economic loss only, plaintiff, who is not in privity with Fiat, may not recover on a claim of breach of implied warranty." Arthur Jaffe Assoc. v. Bilsco Auto Serv., Inc. 453 N.Y.S.2d 501, 502 (N.Y. App. Div. 1982) (citing Hole v. Gen. Motors Corp., 442 N.Y.S.2d 638 (N.Y. App. Div. 1981). "Our interpretation of [section 2-318] leads us to conclude that it does not permit a plaintiff, not in privity, to recover upon the breach of an implied warranty of merchantability unless the claim of the remote user is for personal injuries." Hole, 442 N.Y.S.2d at 640.	
North Carolina		"[T]he absence of privity does not bar plaintiff's recovery against the automobile manufacturer." Tommy Williams v. Hyatt Chrysler-Plymouth, Inc., 269 S.E.2d 184, 188 (N.C. Ct. App., 1980)

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
North Dakota		"Although the parties to an action based on implied warranty need not be in direct contractual privity, any implied warranty generally follows a sale or consumer purchase or arises though some economic relationship." Sime v. Tvenge Assoc. Architects & Planners, P.C., 488 N.W.2d 606, 611 (N.D. 1992) (citing Lang v. Gen. Motors Corp., 136 N.W.2d 805 (N.D. 1965)). "Accordingly, under modern marketing conditions, when a manufacturer puts a new truck-tractor or other new product into the stream of trade and promotes its sale to the public, an implied warranty that it is reasonably fit and suitable for use, as such, accompanies such new vehicle into the hands of the ultimate buyer. Absence of privity between the manufacturer and the buyer is immaterial." Lang v. General Motors Co., 136 N.W.2d 805, 810 (N.D. 1965).
Ohio	"Absent privity, claims for breach of implied warranty must be pursued as tort claims." Trgo v. Chrysler Corp., 34 F. Supp.2d 581, 587 (N.D. Ohio 1998).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Oklahoma		"We hold a manufacturer may be held liable for breach of implied warranty of merchantability or fitness for particular purpose under the Uniform Commercial Code without regard to privity of the contract between the manufacturer and the ultimate buyer." Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849, 852 (Okla. 1980).
Oregon	"This court has adhered to the rule that privity of contract is essential before a purchaser can recover economic loss from a manufacturer for breach of implied warranty." Davis v. Homasote Co., 574 P.2d 1116, 1117 (Or. 1977).	
Pennsylvania		"[Plaintiff's] cause of actioin is based on Pennsylvania law, that allows recovery for breaches of implied warranties even though there is no privity between the purchaser and the remote manufacturer." Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1180-81 (3rd Cir. 1972).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Rhode Island	Rhode Island courts have not unequivocally said whether privity is a requirement for recovery of economic damages as a result of a breach of the implied warranty of merchantability. Rhode Island jurisprudence, however, indicates that the state has not abandoned the privity requirement. See Francis v. Alaska Diesel Electric, Inc., 52 F.Supp. 2d 511, 518 (D.R.I. 1999) ("[T]he Rhode Island courts have emphasized the importance of privity of contract in the application of the economic loss doctrine."); see also Hart Eng'g Co. v. FMC Corp., 593 F.Supp. 1471 (D.R.I. 1984).	
South Carolina		"The plain language of ... section [36-2-318] dispenses with the necessity of privity as to any natural person who may be expected to use, consume or be affected by the product, and extends third party beneficiary protection to this class of person with respect to both injury and damage to 'person or property.'" Gasque v. Eagle Mach. Co., Ltd., 243 S.E.2d 831, 832 (S.C. 1978).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
South Dakota		"It was decided in federal court on the basis of South Dakota law that 'lack of privity is no defense in South Dakota in a breach of implied warranty action by a remote buyer against a manufacturer even though the buyer seeks only the recovery of damages for economic losses.'" Cundy v. Int'l Trencher Service, Inc., 358 N.W.2d 233, 240 (S.D. 1984) (quoting Horizons, Inc. v. Avco Corp., 551 F.Supp. 771, 777-78 (W.D.S.D. 1982)).
Tennessee	"Therefore, we must necessarily reach the conclusion that the rule requiring privity of contract between the parties as an essential element of implied warranty still exists in Tennessee, except in cases where the product involved is 'in defective condition unreasonably dangerous to the user or to his property.'" Leach v. Wiles, 429 S.W.2d 823, 831 (Tenn. Ct. App. 1968)	
Texas	"As plaintiff bases his suit on a theory of breach of warranties, both express and implied, there can be no recovery of consequential economic damages from the remote manufacturer in this case because of the lack of privity of contract between them." Veretto v. Eli Lilly & Co., 369 F. Supp. 1254, 1255 (N.D. Tex. 1974)	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Utah	"A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods an who is injured by breach of the warranty." Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 18 n. 8 (Utah, 1990) "The purpose of [section 70A-2-318] is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'" Id. at 18.	
Vermont	" Moreover, as recently as 1988, the Vermont Supreme Court noted that the Vermont version of the UCC, unlike that of Massachusetts, has not eliminated the privity requirement beyond that expressed in § 2-318. Mainline Tractor & Equip. Co., Inc. v. Nutrite Corp., 937 F.Supp. 1095, 1108 (D. Vermont, 1996)(citing Costa v. Volkswagen of Am., 551 A.2d 1196 (1988), overruled on other grounds by Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990)).	

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Virginia		"Lack of privity between plaintiff an defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods . . . ." Va. Code Ann. § 8.2-318; but see, Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc., 491 S.E. 2d 731, 734 (Va. 1997)("Section 8.2-715 (2)(a) does not address the general subject of the common law privity requirement's effect on the ability of a litigant to maintain an action for breach of warranty. It is limited to that part of the litigation dealing with the damages which may be recovered and imposes a contract requirement only where recovery of consequential damages is sought. Applying the rule of statutory construction recited above, the limited contract requirement of § 8.2-715 (2) prevails over the general provisions relating to common law privity in § 8.2-318.").
Washington	"We hold that vertical privity controls warranty issues here between a remote manufacturer and ultimate purchaser." Touchet Valley Grain Growers, Inc. v. OPP & Seibold General Constr., Inc., 831 P.2d 724, 730 (Wash. 1992).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
West Virginia		"'The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished.'" Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296, 304 (W.Va. 1980) (quoting Roosevelt v. Canteen Corp., 212 S.E.2d 82 (W.Va. 1975)).
Wisconsin	"The plaintiff concedes that the law of Wisconsin has always required privity of contract in an action for breach of implied warranty." Dippel v. Sciano, 155 N.W.2d 55, 57 (Wis. 1967)(citations omitted).	
Wyoming		"The question raised by this appeal is whether privity of contract is required or is not required in an action by a remote purchase against a manufacturer to recover an economic loss . . . . We shall hold that privity of contract is not necessary in such an action." Western Equip. Co., Inc. v. Sheridan Iron Works, Inc., 605 P.2d 806, 807 (Wyo. 1980).

Of fifty-one jurisdictions analyzed, seventeen still require privity for an action under breach of implied warranty of merchantability for economic loss. Thirty-one states have abandoned the privity requirement. Rhode Island and Utah seem to have retained the privity requirement but there are no cases directly on point in either jurisdiction. Louisiana has not adopted the UCC.

EXHIBIT G

CHART OF JURISDICTIONS WHICH HAVE ADOPTED VERBATIM UCC ARTICLE 2-302

UCC ARTICLE 2-302
UNCONSCIONABLE CONTRACT OR CLAUSE

Section 1: If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Section 2: When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

JURISDICTION	UCC ARTICLE 2-302
Alabama	Ala. Code 7-2-302
Alaska	Alaska Stat. 45.02.302
Arizona	Ariz. Rev. Stat. Ann. 47-2302
Arkansas	Ark. Code Ann. 4-2-302
California	Adopted as Cal. Civ. Code 1670.5
Colorado	Colo. Rev. Stat. 4-2-302
Connecticut	Conn. Gen. Stat. 42a-2-302
Delaware	6 Del. Code Ann. 2-302
District of Columbia	D.C. Code Ann. 28:2-302
Florida	Fla. Stat. 672.302
Georgia	Ga. Code Ann. 11-2-302
Hawaii	Haw. Rev. Stat. 490:2-302
Idaho	Idaho Code 28-2-302
Illinois	810 Ill. Comp. Stat. Ann. 5/2-302
Indiana	Ind. Code Ann. 26-1-2-302
Iowa	Iowa Code Ann. 554.2302
Kansas	Kan. Stat. Ann. 84-2-302
Kentucky	Ky. Rev. Stat. Ann. 355.2-302

JURISDICTION	UCC ARTICLE 2-302
Louisiana	*Did Not Adopt*
Maine	11 Me. Rev. Stat. Ann. 2-302
Maryland	Md. Com. Law Code Ann. 2-302
Massachusetts	Mass. Ann. Laws ch. 106, 2-302
Michigan	Mich. Stat. Ann. 440.2302
Minnesota	Minn. Stat. 336.2-302
Mississippi	Miss. Code Ann. 75-2-302
Missouri	Mo. Rev. Stat. 400.2-302
Montana	Mont. Code Ann. 30-2-302
Nebraska	Neb. Rev. Stat. (U.C.C.) 2-302
Nevada	Nev. Rev. Stat. 104.2302
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-302
New Jersey	N.J. Stat. 12A:2-302
New Mexico	N.M. Stat. Ann. 55-2-302
New York	N.Y. U.C.C. Law 2-302
North Carolina	N.C. Gen. Stat. 25-2-302
North Dakota	N.D. Cent. Code 41-02-19 (2-302)
Ohio	Ohio Rev. Code Ann. 1302.15
Oklahoma	12A Okla. Stat. 2-302
Oregon	Or. Rev. Stat. 72.3020
Pennsylvania	13 Pa. Stat. Ann. 2302
Rhode Island	R.I. Gen. Laws 6A-2-302
South Carolina	S.C. Code Ann. 36-2-302
South Dakota	S.D. Codified Laws 57A-2-302
Tennessee	Tenn. Code Ann. 47-2-302
Texas	Tex. Bus. & Com. Code Ann. 2.302
Utah	Utah Code Ann. 70A-2-302

JURISDICTION	UCC ARTICLE 2-302
Vermont	9A Vt. Stat. Ann. 2-302
Virginia	Va. Code Ann. 8.2-302
Washington	Wash. Rev. Code 62A.2-302
West Virginia	W. Va. Code 46-2-302
Wisconsin	Wis. Stat. 402.302
Wyoming	Wyo. Stat. 34.1-2-302

EXHIBIT H

COMMON CHARACTERISTICS OF CONSUMER FRAUD LAWS OF 51 JURISDICTIONS

STATUTES THAT BROADLY PROHIBIT UNFAIR AND DECEPTIVE PRACTICES (Typically modeled after Federal Trade Commission Act, which provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1).)		STATUTES THAT ENUMERATE A "LAUNDRY LIST" OF PROHIBITED PRACTICES (Typically derive from the Commission on Uniform State Laws, and prohibit representing that goods have characteristics, uses, benefits, or qualities that they do not have, or that goods are of a particular standard, quality, or grade if they are of another (the "Standard Deceptive Practices").)	
Alabama[1]	New Jersey	Alabama	Nevada
Arizona	New Mexico	Alaska	New Hampshire
Arkansas	New York	Arkansas	Ohio
Connecticut	North Carolina	California	Oklahoma
Delaware	North Dakota	Colorado	Oregon
Florida	Oklahoma	District of Columbia	Pennsylvania
Georgia	Oregon	Georgia	Rhode Island
Hawaii	Rhode Island	Idaho	South Dakota
Idaho	South Carolina	Illinois	Tennessee
Iowa	Tennessee	Indiana	West Virginia
Kentucky	Texas	Iowa	Texas
Louisiana	Utah	Kansas	Utah
Maine	Vermont	Maryland	Virginia
Massachusetts	Virginia	Michigan	West Virginia
Missouri	Washington	Minnesota	Wisconsin
Montana	Wyoming	Mississippi	Wyoming
Nebraska			

[1]Several states (Alabama, Arkansas, Georgia, Idaho, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia and Wyoming) have adopted the substance of both the FTC Act and the Standard Deceptive Practices in their consumer fraud statutes.

CONSUMER FRAUD LAWS OF 51 JURISDICTIONS

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
AL	Standard Deceptive Practices laundry list of "deceptive acts or practices in the conduct of any trade or commerce" including, but not limited to: "[r]epresenting that goods or services have . . . characteristics, . . . uses, benefits, or qualities that they do not have"; "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another"; and "[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." [2/]	No.[3/]	No.[4/]	Actual damages, treble damages, equitable relief.[5/]
AK	Standard Deceptive Practices laundry list plus "using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services. . . ."[6/]	No.[7/]	No.[8/]	Actual damages, treble damages, equitable relief.[9/]

[2/] Ala. Code § 8-19-5(5), (7), (26).

"Representing that goods or services have . . . characteristics, . . . uses, benefits, or qualities that they do not have," and "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another," as well as provisions that are substantially analogous thereto, are referred to herein as the "Standard Deceptive Practices."

[3/] Id.; see Nunlev v. State, 628 So.2d 619 (Ala. 1993)

[4/] See ids.

[5/] Ala. Code. § 8-19-10(a); see also 8-19-10(a)(3) (availability of injunctive relief), 8-19-8(e) ("the court may grant such other appropriate relief as the court may determine.")

[6/] Alaska Stat. § 45.50.471(b)(4), (6), (12).

[7/] State v. O'Neill Investigation Inc., 609 P.2d 520 (Alaska 1980).

[8/] State v. O'Neill Investigation Inc., 609 P.2d 520 (Alaska 1980).

[9/] Alaska Stat. § 45.50.501; § 45.50.531(a) (triple actual damages or $500, "whichever is greater" and "[t]he Court may provide such other relief it considers necessary and proper."); see also 45.50.901(b) (allowing restitution).

BEST AVAIL

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
AZ	Blanket prohibition providing: "The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice."[10/]	No.[11/]	No.[12/]	Actual damages,[13/] punitive damages,[14/] equitable relief.[15/]
AR	Laundry list of "[d]eceptive and unconscionable trade practices," including "[e]ngaging in any . . . unconscionable, false, or deceptive act or practice in business, commerce, or trade."[16/]	Not in all instances.[17/]	No.[18/]	Actual damages, punitive damages, equitable relief.
CA	Standard Deceptive Practices laundry list of "unfair and deceptive business practices."[19/]	No.[20/]	No.[21/]	Actual damages, punitive damages, equitable relief, injunctive relief, restitution.[22]

[10/]Ariz. Rev. Stat. § 44-1522(A)

[11/]State ex rel. Corbin v. Tolleson, 773 P.2d 490, 503 (Ariz. App. 1989) (intent to deceive not required to find violation; intent to do the underlying act is sufficient).

[12/]Id. at 502 ("Reliance is not an element of consumer fraud."); but see Peery v. Hansen, 585 P.2d 574, 577 (Ariz. App. 1978) (reliance required under common law fraud).

[13/]Holeman v. Neils, 803 F. Supp. 237 (D. Ariz. 1992).

[14/]Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 666 P.2d 83 (Ariz. App. 1983)

[15/]Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119 (Ariz. 1974); Ariz. Rev. State. § 44-1528.

[16/]Ark. Code Ann. § 4-88-107(a).

[17/]Id.

[18/]Id.

[19/]Cal. Civ. Code §§ 1760, 1770(a)(5) & (7).

[20/]Cal. Civ. Code § 1170(a).

[21/]Id.

[22/]Cal. Civ. Code § 1780(a).

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State	Pertinent Deceptive Practices Prohibition	Requires Scienter?	Requires Intrastate Reliance?	Relief Available
CO	Standard Deceptive Practices laundry list plus "[f]ail[ing] to disclose material information concerning goods. . . ."[23]	Yes.[24]	No.[25]	Actual damages, treble damages, equitable relief.[26]
CT	Blanket prohibition providing: "No person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce."[27]	No.[28]	No.[29]	Actual damages, punitive damages, equitable relief.[30]
DE	Blanket prohibition providing: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact . . . in connection with the sale, lease or advertisement of any merchandise . . . is an unlawful practice."[31]	No.[32]	No.[33]	Actual damages, punitive damages, equitable relief[34]

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[23]Col. Rev. Stat. § 6-1-105(1)(e), (g) & (u).

[24]Col. Rev. Stat. § 6-1-105.

[25]See Col. Rev. Stat. 6-1-113(1).

[26]Col. Rev. Stat. 6-1-113; Witters v. Daniel Motors, Inc., 524 P.2d 632, 635 (Col. App. 1974) (all common law remedies are available for a CCPA violation); 6-1-110 (injunctive relief including restitution and preemption of "unjust enrichment").

[27]Conn. Gen. Stat. § 42-110b.

[28]Web Press Servs. Corp. v. New London Motors, Inc., 525 A.2d 57, 68 (Conn. 1987); Conn. Gen. Stat. § 42-110g(a).

[29]Hinchcliffe v. AMC, 440 A.2d 810, 815-16 (Conn. 1981); Conn. Gen. Stat. § 42-110g(a).

[30]Conn. Gen. Stat. § 42-110g(a) ("actual damages . . . the court may, in its discretion, award punitive damages, and may provide such equitable relief as it deems necessary or proper."); see also 42-110d(e) (restitution is available as equitable relief).

[31]6 Del. Code § 2513(a).

[32]Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983).

[33]Id.

[34]Id. at 1076; 6 Del. Code § 2523 (includes restitution).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
DC	Standard Deceptive Practices laundry list plus "misrepresent[ation] as to a material fact which has a tendency to mislead"; and "fail[ure] to state a material fact if such failure tends to mislead."[35]	????.[36]	No.[37]	Treble damages, punitive damages, equitable relief.[38]
FL	Blanket prohibition providing: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[39]	No.[40]	No.[41]	Actual damages, equitable relief, declaratory relief.[42]
GA	Blanket prohibition on "[u]nfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce," plus Standard Deceptive Practices laundry list.[43]	No.[44]	Yes.[45]	Actual damages, punitive damages, equitable relief.[46]

[35] See D.C. Code § 28-3904(a), (d), (e), (f).

[36] Osbourne v. Capital City Mortg. Corp., 727 A.2d 322, 325-26 (D.C. App. 1999) (clear and convincing evidence standard applies to claims of intentional misrepresentation under the CPPA)

[37] D.C. Code § 28-3904.

[38] D.C. Code § 28-3905(k)(1).

[39] Fla. Stat. § 501.204(1).

[40] See Fla. Stat. § 501.211.2

[41] Davis v. Powertel, Inc., 2000 Fla. App. LEXIS 16959 (Fla. App. 2000) (opinion not final until time expires to file motion for rehearing, and disposition thereof if filed).

[42] Fla. Stat. § 501.211.

[43] Ga. Stat. § 10-1-393(b)(5), (7).

[44] Ga. Stat. § 10-1-399(a).

[45] Lynas v. Williams, 454 S.E.2d 570, 574 (Ga. App. 1995).

[46] Ga. Stat. § 10-1-399(a).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
HI	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.[47]	No.[48]	No.[49]	Actual damages, treble damages, equitable relief[50]
ID	Standard Deceptive Practices laundry list plus "Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer"; and "Engaging in any unconscionable method, act or practice in the conduct of trade or commerce. . . ."[51]	No.[52]	No.[53]	Actual damages, punitive damages, equitable relief, injunctive relief, restitution.[54]
IL	Standard Deceptive Practices laundry list plus "engag[ing] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."[55]	No.[56]	No.[57]	Actual damages, punitive damages, equitable relief, injunctive relief.[58]

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[47] Haw. Rev. Stat. § 480-2.

[48] Davis v. Wholesale Motors, 949 P.2d 1026, 1038 (Haw. App. 1997) (listing elements of violation of HRS @ 480-13)

[49] Compare id.; Hawaii's Thousand Friends v. Anderson, 768 P.2d 1293, 1301 (Haw. 1989) (elements of fraud).

[50] Haw. Rev. Stat. § 480-13.

[51] Idaho Code § 48-603(5), (7), (17), (18); § 48-603c.

[52] State ex rel. Kidwell v. Master Distrib., Inc., 615 P.2d 116, 122-23 (Idaho 1980).

[53] Id.

[54] Idaho Code § 48-608.

[55] 815 ILCS § 510/2 (5), (7), (12)

[56] Smith v. Prime Cable of Chicago, 658 N.E.2d 1325, 1335 (Ill. App. 1995).

[57] 815 ILCS § 510/2.

[58] 815 ILCS 510/3 (providing for injunctive relief ". . . in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State.").

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
IN	Standard Deceptive Practices laundry list.[59]	No.[60]	Yes.[61]	Actual damages, equitable relief, restitution.[62]
IA	"The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise. . . ", including represent[ing] in connection with the lease, sale, or advertisement of any merchandise that [it] has certain performance characteristics, . . . uses, or benefits. . . " that it does not have.[63]	No.[64]	No.[65]	No private cause of action under statute.[66]
KS	Standard Deceptive Practices laundry list plus "use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact"; "failure to state a material fact, or the . . . concealment, suppression or omission of a material fact. . . ."[67]; and "any unconscionable act or practice in connection with a consumer transaction . . . . whether it occurs before, during or after the transaction."[68]	Yes.[69]	No[70]	Actual damages, injunctive relief, equitable relief, declaratory relief.[71]

[59] Ind. Code § 24-5-0.5-3(a)(1), (2)
[60] McKinney v. State, 693 N.E.2d 65, 67-69 (Ind. 1998).
[61] Ind. Code § 24-5-0.5.4(a).
[62] Ind. Code § 24-5-0.5-4.
[63] Iowa Code § 714.16.2(a).
[64] State v. Hydro Mfg., Ltd., 436 N.W.2d 617, 622 (Iowa 1989).
[65] Iowa Code § 714.16.2(a); State v. Hydro Mfg., Ltd., 436 N.W.2d 617, 622 (Iowa 1989).
[66] Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 228 (Iowa 1998).
[67] Kan. Stat. § 50-626(a), (b)(1), (b)(2), (b)(3).
[68] Kan. Stat. § 50-627.
[69] Porras v. Bell, 857 P.2d 676, 678 (Kan. App. 1993); Kan. Stat. § 50-627(b).
[70] Kan. Stat. § 50-626(b).
[71] Kan. Stat. § 50-634.

State	Common Deceptive Practices Prohibited	Reliance Necessary?	Requires Individual Reliance?	Relief Available
KY	Blanket prohibition providing: "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . . [U]nfair shall be construed to mean unconscionable."[72]	No.[73]	No.[74]	Actual damages, punitive damages, equitable relief.[75]
LA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[76]	No.[77]	No.[78]	Actual damages, treble damages, equitable relief.[79]
ME	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful."[80]	No.[81]	No.[82]	Actual damages, equitable relief (including restitution), injunctive relief.[83]

[72] Ky. Rev. Stat. § 367.170.

[73] Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287, 291 (Ky. 1991)

[74] Telcom Directories, Inc. v. Commonwealth, 833 S.W.2d 848, 850 (Ky. App. 1991)

[75] Ky. Rev. Stat. § 367.220(1).

[76] La. Rev. Stat. § 51:1405(A).

[77] See La. Rev. Stat. § 51:1409(A).

[78] See Core v. Martin, 543 So. 2d 619, 621 (La. App. 1989) (unlawful conduct need only "involve" fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct).

[79] La. Rev. Stat. § 51:1409(A) (actual and treble damages not available on class basis); La. Rev. Stat. § 51:1408 (equitable relief including restitution)

[80] 5 Me. Rev. Stat. § 207(1).

[81] Bartner v. Carter, 405 A.2d 194, 200 (Me. 1979).

[82] See Guiggev v. Bombardier, 615 A.2d 1169, 1172 (Me. 1992)

[83] 5 Me. Rev. Stat. § 213(1).

State	Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MD	Standard Deceptive Practices laundry list plus any "[f]alse . . . or misleading oral or written statement . . . or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers"; "[f]ailure to state a material fact if the failure deceives or tends to deceive"; and "[d]eception, fraud, . . . misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with . . . [t]he promotion or sale of any consumer goods"[84]	No.[85]	No.[86]	Actual damages, equitable relief (including restitution), injunctive relief.[87]
MA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[88]	No.[89]	No.[90]	Actual damages, treble damages, equitable relief, , injunctive relief.[91]
MI	Standard Deceptive Practices laundry list plus "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer"; and "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner."[92]	No.[93]	No.[94]	Actual damages, equitable relief, injunctive relief, restitution, declaratory relief.[95]

[84] Md. Com. Law Code § 13-301(1), (2)(i) & (iv), (3), 9(i).
[85] Md. Com. Law Code § 13-301(1)-(3); but see Md. Com. Law Code § 13-301(9).
[86] Md. Com. Law Code § 13-301(1)-(3).
[87] Md. Com. Law Code § § 13-408(a); § 13-406(c).
[88] Mass. Gen. L. Ch. 93A, § 2.
[89] Giannasca v. Everett Aluminum, Inc., 431 N.E.2d 596, 599 (Mass. App. 1982).
[90] Fraser Eng'g Co. v. Desmond, 524 N.E.2d 110, 113 (Mass. App. 1988).
[91] Mass. Gen. L. Ch. 93A, § 9.
[92] Mich. Stat. § 445.903(1)(c), (e), (s), (cc).
[93] See Mich. Stat. § 445.911(6).
[94] Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987).
[95] Mich. Stat. § 445.911 (1), (3), (4).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MN	Standard Deceptive Practices laundry list plus "engag[ing] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."[96]	No.[97]	No.[98]	Actual damages, equitable relief, injunctive relief, restitution.[99]
MS	Standard Deceptive Practices laundry list.[100]	No.[101]	No.[102]	Actual damages, equitable relief (including restitution)[103]
MO	Blanket prohibition providing: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is declared to be an unlawful practice."[104]	No.[105]	No.[106]	Actual damages, punitive damages, equitable relief.[107]

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[96]Minn. Stat. § 325D.44 (5), (7), (13).

[97]Minn. Stat. § 325D.45(1).

[98]Id.

[99]Minn. Stat. § 325D.45(1) (injunctive relief), (3) (in addition to other remedies available against same conduct); see cmts. & annotations following § 32D.45.

[100]Miss. Code § 75-24-5(1), (2)(e) & (g).

[101]See Miss. Code § 75-24-19(1)(b), (3).

[102]See Southwest Starving Artists Group, Inc. v. State, 364 So.2d 1128, 1130-31 (Miss. 1978).

[103]Miss. Code § 75-24-15(1) (actual damages in addition to all other statutory and common law remedies (but see Miss. Code § 75-24-15(4) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person."); Miss. Code § 75-24-11 (equitable relief, restitution).

[104]Vernon's Missouri Stat. § 407.020(1).

[105]State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635-36 (Mo. App. 1988).

[106]Id.

[107]Vernon's Missouri Stat. § 407.025(1).

State	Restricts Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MT	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."[108]	No.[109]	No.[110]	Actual damages, treble damages, equitable relief,[111] restitution.[112]
NE	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."[113]	No.[114]	No.[115]	Actual damages, punitive damages, injunctive relief, restitution.[116]
NV	Standard Deceptive Practices laundry list plus "mak[ing] any other false representation in a transaction"; and "[f]ail[ing] to disclose a material fact in connection with the sale or lease of goods. . . ."[117]	No.[118]	No.	Actual damages, equitable relief, restitution[119]

[108] Mont. Code § 30-14-103.

[109] See Darvial v. T&W Chevrolet, 641 P.2d 1368, 1371 (Mont. 1982).

[110] Id. at 1371-72.

[111] Mont. Code § 30-14-133(1) (provides for individual actions only).

[112] Mont. Code § 30-14-131.

[113] Neb. Rev. Stat. § 59-1602.

[114] See Cao v. Huan Nguyen, 607 N.W.2d 528 (Neb. 2000)

[115] Id.

[116] Neb. Rev. Stat. 59-1609 (injunctive relief, actual damages, punitive damages not to exceed $1,000); § 59-1608 (court may order restitution of anything acquired by fraudulent acts).

[117] Nev. Rev. Stat. § 598.0915(5), (7), (14); § 598.0923(2).

[118] See Nev. Rev. Stat. § 598.0979(1) (knowledge, not intent, required as element of a deceptive trade practice).

[119] Nev. Rev. Stat. § 41.600 (actual damages); Nev. Rev. Stat. § 598.0993 (equity/restitution).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
NH	Standard Deceptive Practices laundry list.[120]	No.[121]	No.[122]	Actual damages, double damages, treble damages, equitable relief, injunctive relief.[123]
NJ	Blanket prohibition providing: "The act, use or employment . . . of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice . . . ."[124]	No.[125]	No.[126]	Actual damages, treble damages, equitable relief.[127]
NM	Blanket prohibition providing: "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful."[128]	No.[129]	No.[130]	Actual damages, treble damages, equitable relief, injunctive relief.[131]

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[120] N.H. Rev. Stat. § 358-A:2(V), (VII).

[121] See N.H. Rev. Stat. § 358-A:10(I).

[122] See Barrows v. Boles, 687 A.2d 979, 986 (N.H. 1996).

[123] N.H. Rev. Stat. § 358-A:10(I); § 358-A:10-a.

[124] N.J. Rev. Stat. § 56:8-2.

[125] But see Fenwick v. Kay Am. Jeep, Inc., 371 A.2d 13 (N.J. 1977) (intent required only where claim based purely on a concealment, suppression, or omission of material fact).

[126] N.J. Rev. Stat. § 56:8-2.

[127] N.J. Rev. Stat. § 56:8-19.

[128] N.M. Stat. § 57-12-3.

[129] N.M. Stat. § 57-12-10A.

[130] See id.

[131] N.M. Stat. § 57-12-10(A), (B) (but only class representative in class action entitled to treble damages).

BEST AVAIL

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
NY	Blanket prohibition providing: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."[132]	No.[133]	No.[134]	Actual damages, treble damages, equitable relief.[135]
NC	Blanket prohibition providing: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[136]	No.[137]	No.[138]	Actual damages, treble damages.[139]
ND	Blanket prohibition providing: "The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice."[140]	No.[141]	No.[142]	Actual damages, treble damages.[143]

[132] N.Y. Gen. Bus. Law § 349(a).
[133] Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 897 (N.Y. 1999).
[134] Stutman v. Chemical Bank, 731 N.E.2d 608, 612 (N.Y. 2000)
[135] N.Y. Gen. Bus. Law § 349(h).
[136] N.C. Gen. Stat. § 75-1.1(a).
[137] Tomlinson v. Camel City Motors, 408 S.E.2d 853, 858 (N.C. 1991).
[138] Earce v. Am. Defender Life Ins. Co., 343 S.E.2d 174, 180 (N.C.1986).
[139] N.C. Gen. Stat. § 75-16 (any damages assessed shall be trebled).
[140] N.D. Cent. Code § 51-15-02.
[141] See N.D. Cent. Code § 51-15-09.
[142] N.D. Cent. Code § 51-15-02.
[143] N.D. Cent. Code § 51-15-09.

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State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Industrial Reliance?	Relief Available
OH	Standard Deceptive Practices laundry list.[144]	No.[145]	No.[146]	Actual damages, equitable relief, injunctive relief, rescission, declaratory relief.[147]
OK	Blanket prohibition of unfair or deceptive trade practices, plus Standard Deceptive Practices laundry list.[148]	No.[149]	No.[150]	Actual damages.[151]
OR	Standard Deceptive Practices laundry list plus "[c]oncurrent with tender or delivery of any . . . goods . . . fail[ing] to disclose any known material defect"; and "[e]ngag[ing] in any other unfair or deceptive conduct in trade or commerce."[152]	No.[153]	No.[154]	Actual damages, punitive damages, equitable relief, injunctive relief.[155]

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[144] Ohio Rev. Code § 1345.02(A), (B)(1), (B)(2).

[145] See Ohio Rev. Code § 1345.09(F)(2).

[146] See Ohio Rev. Code § 1345.09(D).

[147] Ohio Rev. Code § 1345.09(A), (B), (D).

[148] 15 Okla. Stat. §§ 752(11), (12); 753(5), (7), (20).

[149] Patterson v. Beall, 2000 WL 1707795, *5 (Okla. Nov. 14, 2000) (listing elements of violation) (subject to revision or withdrawal prior to publication in permanent law reports).

[150] 15 Okla. Stat. § 752(11).

[151] 15 Okla. Stat. §§ 761.1(A) (statutory penalties for unconscionable practices available in individual actions only under § 761.1(B)).

[152] Or. Rev. Stat. § 646.608(1)(e), (g), (t), (u); see § 646.608(2) ("A representation under subsection (1) . . . may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.")

[153] Or. Rev. Stat. § 646.638(1); Luedeman v. Tri-west Constr. Co., 592 P.2d 281, 282-83 (Or. App. 1979) (proof of willfulness (*i.e.*, knew/should have known of violation) required for damages under § 646.638.1).

[154] Or. Rev. Stat. § 646.608(3); Raudebaugh v. Action Pest Control, Inc., 650 P.2d 1006, 1009 (Or. App. .982).

[155] Or. Rev. Stat. § § 646.632 (injunctive relief); 646.636 (restitution/equitable relief); 646.638(1) (actual and punitive damages/equitable relief)

State	Formation: Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
PA	Standard Deceptive Practices laundry list plus "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."[156]	No.[157]	No.[158]	Actual damages, treble damages, equitable relief.[159]
RI	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"; plus Standard Deceptive Practices laundry list plus "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding"; "[e]ngaging in any act or practice which is unfair or deceptive to the consumer"; and "[u]sing any other methods, acts or practices which mislead or deceive members of the public in a material respect"[160]	No.[161]	No.[162]	Actual damages, punitive damages, equitable relief.[163]
SC	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[164]	No.[165]	No.[166]	Actual damages, treble damages, equitable relief.[167]

[156] 73 Pa. Stat. §§ 201-3; 201-2(4)(v), (vii), (xxi).

[157] But see Prime Meats v. Yochim, 619 A.2d 769, 773 (Pa. Super. 1993) ("to recover under . . . § 201-2(4)(xvii), the elements of common law fraud [including scienter] must be proven").

[158] But see Dilucido v. Terminix Int'l. Inc., 676 A.2d 1237, 1240-41 (Pa. Super. 1996) (to recover for ascertainable losses under. § 201-9.2, plaintiff must "establish[] a causal connection to or reliance on" alleged deceptive conduct); Prime Meats v. Yochim, 619 A.2d 769, 773 (Pa. Super. 1993) ("to recover under . . . § 201-2(4)(xvii), the elements of common law fraud [including reliance] must be proven").

[159] 73 Penn. Stat. § 201-9.2(a).

[160] R.I. Gen. Laws §§ 6-13.1-2; 6-13.1-1(5)(E), (G), (L), (M), (N).

[161] See R.I. Gen. Laws §§ 6-13.1-1; 6-13.1-5.2 (no scienter/intent element).

[162] See ids. (no reliance element).

[163] R.I. Gen. Laws. § 6-13.1-5.2.

[164] S.C. Code § 39-5-20(a)

[165] State ex rel. McLeod v. C & L Corp., 313 S.E.2d 334, 338 (S.C. App. 1984)

[166] Id.; see also, deBondt v. Carlton Motorcars, Inc., 536 S.E.2d 399, 407-08 (S.C. App. 2000)

[167] S.C. Code § 39-5-104(a) (precludes class-wide recovery of actual/treble damages).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Detrimental Reliance	Relief Available
SD	Laundry list of deceptive acts and practices including: to "[k]nowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise. . . ."[168]	Yes.[169]	No.[170]	Actual damages, equitable relief, restitution.[171]
TN	Blanket prohibition on unfair or deceptive acts or practices, including the Standard Deceptive Practices.[172]	No.[173]	No.[174]	Actual damages, treble damages, equitable relief, declaratory relief.[175]
TX	Blanket prohibition providing: "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"; plus Standard Deceptive Practices laundry list plus "the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed"[176]	No.[177]	Yes.[178]	Actual damages, treble damages, equitable relief, injunctive relief, restitution.[179]

[168] S.D. Code Laws § 37-24-6(1)

[169] Id.

[170] Id.

[171] S.D. Code Laws § 37-24-31; see also § 37-24-29 (restitution/equitable relief).

[172] Tenn. Code Ann. § 47-18-104(a), (b)(5), (7), (23).

[173] See Smith v. Scott Lewis Chevrolet, 843 S.W.2d 9, 12 (Tenn. App. 1992); Tenn. Code Ann. § 47-18-109(a)(3), (a)(4)(D).

[174] Harvey v. Ford Motor Credit Co., 1999 Tenn. App. LEXIS 448, *4 (Tenn. App. July 13, 1999); Lien v. Couch, 993 S.W.2d 53, 57 (Tenn. App. 1998) (recognizing consumer protection statutes ordinarily dispense with reliance requirement); see Tenn. Code Ann. § 47-18-109.

[175] Tenn. Code Ann. § 47-18-109.

[176] Tex. Bus. & Com. Code § 17.46(a), (b)(5) & (7).

[177] See Tex. Bus. & Com. Code § 17.50(b)(1).

[178] Tex. Bus. & Com. Code § 17.50(a)(1)(B).

[179] Tex. Bus. & Com. Code § 17.50(b).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter	Requires Individual Reliance	Relief Available
UT	Blanket prohibition on deceptive acts or practices in connection with consumer transactions, plus Standard Deceptive Practices laundry list.[180]	Yes.[181]	No.[182]	Actual damages, equitable relief, injunctive relief, declaratory relief.[183]
VT	Blanket prohibition providing: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."[184]	No.[185]	Yes.[186]	Actual damages (including purchase price), punitive damages.[187]
VA	Standard Deceptive Practices laundry list plus "[a]dvertising or offering for sale goods which are . . . defective . . . without clearly and unequivocally indicating . . . that the goods are . . .defective"; and "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction". [188]	No.[189]	No.[190]	Actual damages, treble damages, equitable relief, restitution.[191]

[180] Utah Code § 13-11-4(1), (2)(a) & (b).
[181] Utah Code § 13-11-4(2); Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991).
[182] See Utah Code § 13-11-19(1)(b).
[183] Utah Code § 13-11-19.
[184] 9 Vt. Stat. § 2453(a).
[185] Poulin v. Ford Motor Co., 513 A.2d 1168, 1172 (Vt. 1986).
[186] 9 Vt. Stat. § 2461(b); Russell v. Atkins, 679 A.2d 333, 335 (Vt. 1996).
[187] 9 Vt. Stat. § 2461(b) (treble damages limited to three times purchase price).
[188] Va. Code § 59.1-200(A)(5)-(7), (14).
[189] See Va. Code § 59.1-204(A)
[190] Lambert v. Downtown Garage, Inc., 44 Va. Cir. 102, 104-05 (Va. Cir. Ct. 1997)
[191] Va. Code. §§ 59.1-204 (actual, treble damages); 59.1-205 (restitution and other equitable relief).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
WA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[192]	No.[193]	No.[194]	Actual damages, treble damages, injunctive relief.[195]
WV	Standard Deceptive Practices laundry list plus "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding"; and "[t]he act, use or employment . . . of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission . . . ".[196]	No.[197]	No.[198]	Actual damages, equitable relief.[199]
WI	Advertisements, announcements, statements or representations containing any assertion, representation or statement of fact which is untrue, deceptive or misleading.[200]	Yes.[201]	No.[202]	Actual damages, equitable relief.[203]
WY	Laundry list of deceptive trade practices, including: "[r]epresent[ing] that merchandise is of a particular standard [or] grade . . . if it is not"; and "[e]ngag[ing] in unfair or deceptive acts or practices."[204]	No.[205]	Yes.[206]	Actual damages, equitable relief.[207]

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[192] Wash. Rev. Code § 19.86.020.
[193] Tradewell Stores, Inc. v. T.B. & M., Inc., 500 P.2d 1290,1296 (Wash. App. 1972)
[194] See generally, Morris v. Int'l Yogurt Co., 729 P.2d 33 (Wash. 1986).
[195] Wash. Rev. Code § 19.86.090.
[196] W. Va. Code §§ 46A-6-102(f)(5), (7), (12), (13); 46A-6-104.
[197] See ids.
[198] See W. Va. Code §§ 46A-6-102(f)(13; 46A-6-106(1).
[199] W. Va. Code § 46A-6-106(1) (consumer may recover damages or $200, whichever is greater).
[200] Wis. Stats. § 100.18(1).
[201] HBN Partnership v. Schappe, 532 N.W.2d 144 (Wis. App. 1995)
[202] Tim Torres Enters. Inc. v. Linscott, 416 N.W.2d 670, 676 (Wis. App. 1987).
[203] Wis. Stat. § 100.18(11).
[204] Wyo. Stat. § 40-12-105(a)(iii), (xv).
[205] See Wyo. Stat. § 40-12-105.
[206] Wyo. Stat. § 40-12-108(a).
[207] Wyo. Stat. §§ 40-12-108 (actual damages); 40-12-106 (equitable relief including restitution).

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Nos. 02-530

IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, *et al.*,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC.,
BRIDGESTONE CORPORATION
AND FORD MOTOR COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Petitioners are plaintiffs who brought a proposed nationwide class action involving purchasers of about 60 million different Firestone tires involved in a safety investigation conducted by the National Highway Traffic Safety Administration ("NHTSA"), arguing that they were entitled to compensation because the tires had some undefined "propensity" to fail. The district court granted nationwide class certification of plaintiffs' warranty, unjust enrichment, and consumer fraud claims, ruling that Tennessee law applied to all of these claims. The Seventh Circuit reversed the district court's choice-of-law ruling, found that the laws of 51 different jurisdictions would apply to the millions of claims at issue, and ruled that because the laws of different jurisdictions varied materially, class treatment would be unmanageable. Under these circumstances, did the Seventh Circuit err in reaching that conclusion?

2. The Seventh Circuit further ruled that the NHTSA administrative process was superior to class treatment of plaintiffs' claims. Plaintiffs' second, third, and fourth questions presented each distort this superiority holding. The core question is, did the Seventh Circuit err in ruling that class treatment was not superior where the case raised individualized legal and factual issues that would make it unmanageable as a class action, plaintiffs seek to pursue a novel "propensity-to-fail" theory that should be developed (if at all) through individual litigation, and the NHTSA administrative process had already provided relief to those members of the proposed class who owned the specific sizes and types of tires that NHTSA determined should be replaced through a product recall?

PARTIES TO THE PROCEEDINGS

Petitioners are 229 alleged individual purchasers or lessees of certain Ford Explorers or Firestone tires. *See* Pet. App. 82a-85a.

Respondents are (1) Bridgestone/Firestone North American Tire, L.L.C., as successor to Bridgestone/Firestone, Inc.; (2) Bridgestone Corporation; and (3) Ford Motor Company. Bridgestone/Firestone North American Tire, L.L.C. is wholly owned by its parent corporation, Bridgestone/Firestone Americas Holding, Inc., which in turn is wholly owned by its parent corporation, Bridgestone Corporation. Bridgestone Corporation has no parent corporation, and no publicly-held company owns ten percent or more of its stock. This brief is filed on behalf of Bridgestone/Firestone North American Tire, L.L.C. (as the successor to Bridgestone/Firestone, Inc.) and Bridgestone Corporation.

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INTRODUCTION

The petition provides no reason to grant review of the unanimous panel opinion of the Seventh Circuit reversing the district court's erroneous and unprecedented nationwide class certification decision. In attempting to justify review, plaintiffs misstate controlling law, misstate the Seventh Circuit's opinion, and misstate the facts of record.

No federal appellate court has ever approved certification of a litigation class as sprawling and unusual as the one certified by the district court here—a nationwide class of millions of "persons whose tires did *not* fail, whose vehicles did *not* roll over." Pet. App. 4a (emphasis in original). As the Seventh Circuit recognized, the district court improperly lumped together warranty, unjust enrichment, and consumer fraud claims relating to 60 million tires made to scores of different design specifications and sold nationwide over more than a decade. Plaintiffs cite no federal precedent that is even vaguely similar to this case. There is none.

The district court granted class certification based upon a misapplication of Indiana choice-of-law rules, under which all of these nationwide claims against Firestone would be governed by Tennessee law, and on a skewed factual predominance analysis that ignored significant portions of the record. The district court also ignored the reality that most of the tires at issue had been used without incident for many years and for thousands of miles. The district court thus breathed life into millions of "no-injury" claims that likely would have been barred by the laws of most states.

It is unsurprising that the Seventh Circuit reversed class certification: reversal is consistent with the mandates of Rule 23 and the settled law of this Court and circuit courts around the nation. There is no basis for review.

COUNTER-STATEMENT OF THE CASE

In May 2000, the National Highway Traffic Safety Administration ("NHTSA") began an investigation into certain ATX and Wilderness brand tires made by Bridgestone/Firestone, Inc.[1] That investigation was very broad, including about 60 million tires made in 41 different sizes and 53 different lines, to scores of different design specifications, at seven plants, over a decade.

On August 9, 2000, during the course of the NHTSA inquiry and with that agency's oversight, Firestone began a recall of about 14 million P235/75R15-sized ATX and Wilderness AT tires that had been sold, beginning in 1991, primarily to Ford Motor Company for use as original equipment on Explorer vehicles.[2] Although Firestone was unable to identify any defect in the recalled tires, a tiny fraction of them—fewer than 1%—had experienced tread separation failures.[3]

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[1] The entity that conducted the recall and was named as a defendant in this litigation is Bridgestone/Firestone, Inc. Due to a November 2001 restructuring, that entity has been succeeded by Bridgestone/Firestone North American Tire, L.L.C. For ease of reference, however, we refer to both as "Firestone" throughout this brief. Bridgestone Corporation, which was also named as a defendant in this lawsuit, joins in this opposition brief.

[2] Different tires are identified by brand or tire line and by alpha-numeric indicators that detail certain features of the tire. For example, "P235/75R15" conveys the following information: the "P" ordinarily indicates a passenger tire; "235" is the tire's section width (from sidewall to sidewall) in millimeters; "75" is the tire's aspect ratio (*i.e.*, the tire's section height expressed as a percentage of the tire's section width); "R" denotes a radial tire; and "15" is the rim diameter in inches.

[3] Under the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, a "determination of 'defect' may be based exclusively on the performance record of the vehicle or component" (*United States v. Gen. Motors Corp.*, 518 F.2d 420, 432 (D.C. Cir. 1975)), and NHTSA need only establish a "non-de minimus number of failures" to order a product recall (*id.* at 438 n.84). Thus, "[d]eterminations of fault or liability relevant to the award of

When Firestone announced the August 2000 recall, it estimated that about 6.5 million of these tires were still on the road—the others having been worn out and replaced after regular use. To expedite the recall, Firestone replaced recalled tires with new Firestone tires, and also reimbursed tire owners up to $100 per tire if they replaced recalled tires with competitive brands. By December 2000, the recall was essentially complete.

In October 2001, NHTSA determined that approximately 3.5 million Wilderness AT P235/75R15 and P255/70R16-sized tires that had been manufactured prior to May 1998 and used on sport utility vehicles should be recalled. Firestone estimated that about 768,000 of those tires might still be on the road; it agreed to replace those tires as well.[4] NHTSA subsequently closed its investigation as to all other tires. When all was said and done, less than a third of the tires in the NHTSA investigation were subject to recall.

In the wake of the August 2000 recall, numerous consumer class action complaints were filed in state and federal courts against Firestone, Bridgestone, and Ford Motor Company. The defendants removed many of the state-court actions and sought pretrial consolidation of all federal cases under 28 U.S.C. § 1407. Ultimately the cases were consolidated before Judge Sarah Evans Barker of the United States District Court for the Southern District of Indiana.

Thereafter, more than 200 plaintiffs filed a consolidated master class action complaint. These plaintiffs are a disparate group of individuals. They owned tires of different sizes and

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damages at common law" do not enter into the defect inquiry under the Safety Act. *Id.* at 434.

[4] In May 2001, Ford separately announced that it would provide free replacement of all Wilderness AT tires on Ford vehicles, regardless of whether those tires were subject to any NHTSA order or had been recalled by Firestone.

types that were used on different vehicles. They bought their vehicles or tires both new and used, at different times, and in different places. With three exceptions, none of them alleged any failure of any kind in any Firestone tire or any Ford Explorer. Rather, plaintiffs claimed generally that their Firestone tires have a "propensity to fail" from tread/belt separation. Relying on this novel theory, they sought damages and injunctive relief based on fraud and contract theories. Although plaintiffs focused their allegations upon alleged conduct relating to Ford Explorers and recalled P235/75R15 tires, they nevertheless sought to have the trial court certify a massive class of millions of consumers who owned, or had owned, any of the 60 million tires that NHTSA included in its investigation.

In July 2001, the district court granted in part and denied in part defendants' motion to dismiss. Rejecting the position that the law of each plaintiff's state of residence and/or purchase governed his or her claims, the court ruled as a matter of Indiana choice of law that Tennessee law would apply to all of plaintiffs' claims against Firestone and Michigan law to their claims against Ford. It then determined that plaintiffs failed to state valid claims for violations of RICO, negligence, or breach of redhibitory defects under Louisiana law, but could proceed on claims for breach of express and implied warranty, unjust enrichment, and consumer fraud.[5]

In December 2001, the district court certified three classes of owners of Firestone tires and Ford Explorers. In doing so, it rejected prior Seventh Circuit decisions instructing that nationwide purchaser classes alleging fraud and warranty theories raised manageability problems at odds with Rule 23(b)(3). Instead, the district court incorporated its ruling that Tennessee and Michigan law would govern claims against

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[5] In a ruling denying Bridgestone's separate motion to dismiss, the district court ruled that Tennessee law would apply to all claims against Bridgestone.

Firestone and Ford, respectively, and with minor exceptions, ruled that the proposed classes should be certified for all of the legal theories remaining in the case. Thus, after the August 9, 2000 recall was complete and after NHTSA's investigation was closed, the district court certified a massive class of owners of all 60 million Firestone tires that had been subject to the NHTSA inquiry.

Defendants sought review under Rule 23(f). In a unanimous panel decision written by Judge Frank Easterbrook, the Seventh Circuit reversed. The Seventh Circuit first ruled that the district court erred as a matter of Indiana law in its choice-of-law analysis. Under Indiana choice-of-law principles, the laws of all 50 states and the District of Columbia would apply to class members' claims. The Seventh Circuit then determined that the various jurisdictions' laws differed with respect to the elements of plaintiffs' claims. It thus concluded that "[b]ecause [plaintiffs'] claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." Pet. App. 9a.

The Seventh Circuit also ruled that numerous factual differences among members of the class made class certification inappropriate. The tires included in the class "exhibit variability." *Id.* 10a. "[F]ewer than half of those included in the tire class were recalled," and "the six trade names listed in the class certification order comprise 67 master tire specifications: 'Firehawk ATX' tires, for example, come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly." *Id.* And, although plaintiffs claimed that all of the tires lacked certain design characteristics, "whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform." *Id.* (emphasis in original). After noting that "there are other differences" in the factual

circumstances of class members, the court held that the factual differences "preclude[d] any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

Finally, the Seventh Circuit rejected the district court's "certify-at-all-costs" approach to class certification. To begin with, the court noted that, because the plaintiffs seek to pursue novel, no-injury claims, "most states would not entertain the sort of theory that plaintiffs press." Pet. App. 7a. Thus, in assessing whether this litigation satisfied the "superiority" requirement of Rule 23, the district court had misconceived its role: in an attempt to resolve all of the claims of these millions of tire and vehicle owners in a single proceeding, the district court had violated choice-of-law rules and proceeded in a manner that would not allow plaintiffs' claims to be addressed under the various states' laws. The Seventh Circuit recognized that what it labeled as a "decentralized" approach is necessary to permit a fair and efficient assessment of the value (if any) of these nationwide consumer claims. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *Id.* 12a (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)).

Contrary to plaintiffs' assertions, the Seventh Circuit neither took issue with the judgment of state lawmakers nor derived a rule that plaintiffs' claims should not be adjudicated. Rather, the court assessed the manageability and superiority of a single proceeding in which the disparate claims of millions of tire owners located throughout the nation would be aggregated and adjudicated under the law of one state. The court determined that such a proceeding could not be squared with Indiana choice-of-law rules or the requirements of Rule 23. Following this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the Seventh Circuit held

that as "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." Pet. App. 13a. Accordingly, on the facts presented here, "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone." *Id.* 11a (emphasis in original).

Plaintiffs sought *en banc* review. On June 5, 2002, the full court denied their petition, with no judge voting for *en banc* consideration.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S CHOICE-OF-LAW RULING DOES NOT CONFLICT WITH THE LAW OF OTHER CIRCUITS

A. The Seventh Circuit Properly Determined That Because The Laws Of The Jurisdictions At Issue Would Vary Concerning Plaintiffs' Claims, Nation-wide Class Certification Would Be Unmanageable

Plaintiffs do not seek review of the Seventh Circuit's core state-law holding that, under a proper interpretation of Indiana choice-of-law rules, the laws of all 51 jurisdictions would apply to the diverse claims of millions of tire and Explorer owners around the nation.[6] Based upon the record before the Seventh Circuit, reversal of class certification correctly followed as a matter of course.

Even the district court had recognized that the laws of the different jurisdictions at issue vary materially with respect to plaintiffs' warranty, unjust enrichment, and consumer fraud

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[6] In any event, this Court generally does not review state law rulings. *See, e.g., The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

claims. In a portion of its motion-to-dismiss ruling that was incorporated into its class certification decision, the district court recognized that "the relevant substantive laws of the different states involved are sufficiently different to require a choice of law analysis." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001). Plaintiffs' proposal to apply Tennessee law to all claims nationwide against Firestone, and the district court's willingness to accept it, show their basic recognition of the variability of state laws. Indeed, the district court recognized in its class certification ruling that applying Tennessee law nationwide was critical to finding that the case would be manageable, since that eliminated problems of "state law variation that plague the pursuit of class certification in many cases." Pet. App. 67a n.45.

Nevertheless, in addition to attempting to justify the district court's choice-of-law ruling, plaintiffs also argued to the Seventh Circuit that the laws relating to their claims were uniform nationwide. Plaintiffs referred to charts purporting to show similarities among state laws, but those charts in fact illustrated that the law *differs*. Defendants also submitted 33 additional pages of charts showing that plaintiffs significantly understated material variations among the laws of different jurisdictions.[7]

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[7] Plaintiffs did not submit defendants' state-law charts to this Court with their petition. But even according to plaintiffs' own charts, for example, some states model their consumer fraud laws after the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1); others incorporate provisions adopted by the Commission on Uniform State Laws; others use provisions from both sources; still others enumerate their own deceptive acts and practices. Pet. App. 139a-156a. Some states, like Colorado, Kansas, South Dakota, Utah, and Wisconsin, require scienter but not individual reliance. *Id.* 142a, 145a, 154a, 155a. Others, like Georgia, Indiana, Texas, Vermont, and Wyoming, require individual reliance but *not* scienter (*id.* 143a, 145a, 154a, 155a, 156a), while in the District of Columbia, the scienter standard is unknown (*id.* 143a). And Iowa's consumer protection statute does not permit private claims at all (*id.* 145a).

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The Seventh Circuit rejected plaintiffs' argument that the laws were substantially similar. Pet. App. 3a ("state laws about theories such as those presented by our plaintiffs differ"); *id.* 7a ("most states would not entertain the sort of theory that plaintiffs press"); *id.* ("[s]tate consumer-protection laws vary considerably, and courts must respect these differences"). Thus, the Seventh Circuit concluded that nationwide class treatment would be unmanageable. Citing four of its own prior decisions, the Seventh Circuit explained that, "such differences [in relevant state laws] have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes." *Id.* 3a.

The Seventh Circuit certainly did not view this conclusion as a close call, and it was not. As shown below, the ruling is soundly within the body of federal decisions finding that differences in state laws generally preclude nationwide class certification of such claims. In short, the Seventh Circuit's decision was not only correct, but also in the mainstream of contemporary Rule 23 jurisprudence.

B. The "Conflicts" Cited By Plaintiffs Are Illusory

Plaintiffs' assertion that the Seventh Circuit's ruling conflicts with the decisions of other courts of appeals is wrong.

Plaintiffs' charts show that state unjust enrichment laws also incorporate divergent elements—ranging from proof of fraud, to failure of consideration, to a showing that defendant's conduct was "morally wrong." Pet. App. 91a n.7; 92a n.17; 94a n.33; 95a n.45. The charts also show that states vary in their formulation of express warranty law: at least ten states require proof of plaintiff's reliance on the express warranty, while seventeen have not yet addressed the question. *Id.* 107a-109a. With respect to implied warranty, the charts reveal that states are split on whether the buyer and seller must be in privity: 18 states require privity, 32 do not. *Id.* 114a-115a. Louisiana, which has not adopted the UCC, does not recognize breach of implied warranty claims. *Id.* 123a.

Plaintiffs latch onto a single sentence in the Seventh Circuit's opinion: "[n]o class action is proper unless all litigants are governed by the same legal rules." Pet. 14. Plaintiffs contend that the Seventh Circuit announced an inflexible rule that unless the unitary law of a single jurisdiction applies, class treatment is unavailable. But that is neither the essence of the Seventh Circuit's holding nor essential to its conclusion that *this* case would be unmanageable under the divergent laws of 51 different jurisdictions. The Seventh Circuit was essentially reiterating the longstanding view of federal courts that a proposed litigation class will be unmanageable unless there is substantial similarity among the laws applicable to all of the claims at issue. If the laws implicated diverge materially, "the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a) [and] (b)(3)." Pet. App. 3a. The Seventh Circuit's holding does not conflict with any of the decisions cited by plaintiffs.

Fifth Circuit. Contrary to plaintiffs' argument (Pet. 16), the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996), is entirely consistent with the Seventh Circuit's ruling. In the first place, the Fifth Circuit decertified the class action and dismissed the class allegations, relying in part upon differences in state law. *See id.* at 742-44, 752. Second, the *Castano* court did not remand to the district court for "the opportunity to conduct" a choice-of-law analysis, as plaintiffs contend the Seventh Circuit should have done here. Pet. 16. Instead, the *Castano* court assessed how "variations in state law affect predominance and superiority" (84 F.3d at 741), and based upon that review (*id.* at 741-44 & nn.15, 16), determined that the trial court's class certification order should be reversed (*id.* at 749-50). The Seventh Circuit approached this case in the same way. There is no conflict.

DC Circuit. Nor does the Seventh Circuit's approach conflict with the DC Circuit's decision in *Walsh v. Ford*

Motor Co., 807 F.2d 1000 (D.C. Cir. 1986). *Cf.* Pet. 17. The *Walsh* court, like the Seventh Circuit here, *reversed* class certification based in part upon choice-of-law problems. The DC Circuit chose to remand to the district court for an analysis of whether variations in state law "present insuperable obstacles" to class treatment under Rule 23(b)(3), rather than performing that analysis itself. 807 F.2d at 1016-17. But the DC Circuit did not purport to hold that an appellate court *cannot* perform that analysis; nor did the DC Circuit suggest that an appellate court should ignore numerous prior decisions consistent with its current ruling.[8] Here, the Seventh Circuit, relying on its own recent decisions, chose to perform the evaluation and decertify the class.

Ninth Circuit. Plaintiffs also err in contending (Pet. 16) that the Seventh Circuit's approach conflicts with the Ninth Circuit's decision in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). Because *Hanlon* was a *settlement* certification, that court did not have to evaluate whether choice-of-law problems would be insuperable at trial. *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 225 (E.D. La. 1998) (distinguishing *Hanlon* as settlement certification decision).[9] But even on its own terms, *Hanlon* does not establish any conflict warranting *certiorari* review. The *Hanlon* court stated that state-law variations "do not necessarily preclude" Rule 23(b)(3) certification, but noted that plaintiffs must "be prepared to demonstrate the

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[8] On remand, the district court in *Walsh* ruled that differences in relevant state warranty laws made class treatment impossible. *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-76 (D.D.C. 1990).

[9] By contrast, in a subsequent *litigation* class decision, the Ninth Circuit recognized that, "'[w]here the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will 'compound the [] disparities' among class members from the different states.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.), *as amended*, 273 F.3d 1266 (9th Cir. 2001) (citations omitted).

commonality of substantive law applicable to all class members." *Hanlon*, 150 F.3d at 1022. That approach is not at odds with the Seventh Circuit's decision below: the Seventh Circuit assessed the relevant law and determined that there is no commonality with respect to the applicable consumer fraud and contract laws at issue here; it then reversed nationwide class certification.

Third Circuit. Finally, plaintiffs contend that the Third Circuit permits plaintiffs to proceed with nationwide class certification under Rule 23(b)(3) when plaintiffs have made a "creditable showing" that the laws can be grouped into manageable patterns. Pet. 15. They cite *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir. 1986), *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998). The Seventh Circuit ruling here conflicts with none of these decisions.

The Seventh Circuit's ruling is completely consistent with *School Asbestos*. Plaintiffs here failed to show that the specific no-injury claims at issue could be separated into manageable subsets, let alone make a "creditable showing . . . that class certification does not present insuperable obstacles." *School Asbestos*, 789 F.2d at 1010. The Seventh Circuit rejected plaintiffs' argument that the laws relating to these claims are substantially uniform, and instead found that differences in state law would make class certification unmanageable.[10]

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[10] In any event, *School Asbestos* is weak authority for the proposition that nationwide class actions may readily proceed under multiple states' laws. The Third Circuit harbored "doubt" about whether plaintiffs could separate the law of the different states into four categories (789 F.2d at 1010), and noted that "'there will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify a multistate class or to reduce it to a more manageable number of states'"

Plaintiffs' reliance on *Georgine* is also misplaced; in fact, that decision reversed a settlement class certification, ruling that individualized choice-of-law issues implicated there would make the "proliferation of disparate factual and legal issues . . . compound[] exponentially." 83 F.3d at 627. There is no conflict with *Georgine*.

Plaintiffs also err in relying on *Prudential,* which reviewed a settlement class certification.[11] The *Prudential* court recognized that "relatively minor differences in state law" may be overcome by subclassing, and ruled that the appellant objectors "ha[d] failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach." 148 F.3d at 315. The Seventh Circuit here found that the state-law differences were not minor, and accepted defendants' argument that the differences would create insuperable difficulties at trial. Thus, as with *School Asbestos* and *Georgine*, *Prudential* creates no conflict with the Seventh Circuit's ruling here.

(*id.* at 1010 n.11 (citation omitted)). But the Third Circuit was "reluctan[t] to vacate" because of "the highly unusual nature of asbestos litigation." *Id.* at 1011. Judge Posner of the Seventh Circuit has since noted that the choice-of-law analysis in *School Asbestos* was essentially *sui generis*, given that "[t]he number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules." *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1304 (7th Cir. 1995).

[11] Notably, the Third Circuit subsequently reversed nationwide class certification of a *litigation* class based in part upon "individual issues" involving, *inter alia*, "state laws" that "would require individual determinations." *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 (3d Cir. 2001). In doing so, the Third Circuit specifically distinguished *Prudential* on the ground that *Prudential* involved "certification of a *settlement* class action," noting that "[a] settlement class, as distinct from a class action to be tried, does not implicate trial management problems." *Id.* at 146 & n.10 (emphasis in original); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) (distinguishing *Prudential* as settlement certification).

C. The Seventh Circuit's Choice-Of-Law Ruling Is Consistent With The Overwhelming Trend In Contemporary Federal Class-Action Jurisprudence

At bottom, plaintiffs attempt to suggest that the Seventh Circuit is somehow out of step with federal case law involving proposed nationwide class certifications of product- or consumer-based tort and contract claims. Nothing could be further from the truth. Federal courts of appeals have repeatedly rejected proposed nationwide class actions under Rule 23(b)(3). In addition to cases like *Castano*, *Walsh*, and *Georgine*, at least eleven other court of appeals decisions have reversed multistate class certifications or affirmed denials of nationwide class actions, citing choice-of-law concerns.[12] This Court denied *certiorari* in three of those cases—including the petition in *Sikes v. American Telephone & Telegraph Co.*, No. 02-124, just two months ago, which challenged, *inter alia*, the Eleventh Circuit's choice-of-law ruling. *See* 123 S. Ct. 117 (Oct. 7, 2002).

The rationale supporting these court of appeals decisions is consistent and compelling: applying the different laws of multiple state jurisdictions to claims like those at issue here ordinarily makes class treatment unmanageable and is at odds with the superiority requirement of Rule 23(b)(3). A district

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[12] *In re LifeUSA*, 242 F.3d at 147 (reversing nationwide class certification); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir.) (same), *cert. denied sub nom. Sikes v. Am. Tel. & Tel. Co.*, 123 S. Ct. 117 (Oct. 7, 2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564-66 (5th Cir. 2002) (same); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001) (same); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir.) (same), *cert. denied*, 122 S. Ct. 348 (2001); *Spence v. Glock*, 227 F.3d 308, 313 & n.8 (5th Cir. 2000) (same); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (same); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (same); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1300 (same). *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001), (affirming denial of nationwide class certification); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987) (same), *cert. denied*, 485 U.S. 959 (1988).

court would have to apply these different laws at every stage of the proceedings, "complicat[ing] matters exponentially." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996). Thus, a trial court would have to learn the law relating to multiple claims from as many as 51 different jurisdictions, including all of the nuances of each legal regime, since even "nuance can be important" when interpreting different states' laws. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995). "While [that] task may not be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto, renders class certification treatment not superior*." *Castano,* 84 F.3d at 750 (emphasis added).

No fair trial could realistically proceed under such circumstances. Different standards of conduct would apply, "compound[ing] the[ ] disparities" among class members from different states. *Amchem Prods.*, 521 U.S. at 624. And no jury could possibly apply the laws of so many jurisdictions to the different facts of hundreds of thousands of class members. *See, e.g., In re LifeUSA Holding Inc.,* 242 F.3d 136, 148 (3d Cir. 2001) (reversing nationwide litigation class action because, *inter alia*, any attempt to try plaintiffs' claims under varied state laws "would not only be inordinately time consuming and difficult, but it would impermissibly transgress upon the required standards of fairness and efficiency").

The decisions of lower federal courts are consistent with these appellate rulings. Thus, scores of federal district court decisions have denied class certification based in whole or in part upon the fact that the laws of numerous jurisdictions would apply, making class treatment unmanageable.[13] Under

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[13] *See, e.g., In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 67-68, 71 (S.D.N.Y. 2002); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2002 WL 31028234, at *14 (N.D. Ill. Sept. 10, 2002); *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL 31300899, at *5 (N.D. Cal. Aug. 28, 2002); *In re Citigroup, Inc.,* No. CIV.A.

10011912REK, 2001 WL 1682865, at *3 (D. Mass. Dec. 19, 2001); *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 700-02 (S.D. Fla. 2001); *Duncan v. N.W. Airlines, Inc.*, 203 F.R.D. 601, 613-14 (W.D. Wash. 2001); *Neely v. Ethicon, Inc.*, No. 1:00- CV-00569, 2001 WL 1090204, at *8-11, 15 (E.D. Tex. Aug. 15, 2001); *Begley v. Acad. Life Ins. Co.*, 200 F.R.D. 489, 497 (N.D. Ga. 2001); *Oxford v. Williams Cos.*, 137 F. Supp. 2d 756, 764 (E.D. Tex. 2001); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 307-08 & n.8 (N.D. Ohio 2001); *Stipelcovich v. DirecTV, Inc.*, 129 F. Supp. 2d 989, 995 (E.D. Tex. 2001); *Shelley v. AmSouth Bank*, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *8-10 (S.D. Ala. July 24, 2000), *aff'd*, 247 F.3d 250 (11th Cir. 2001); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219-23 (E.D. Pa. 2000); *Adams v. Kan. City Life Ins. Co.*, 192 F.R.D. 274, 277-78 (W.D. Mo. 2000); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 640, 645 (N.D. Okla. 2000); *Velasquez v. Crown Life Ins. Co.*, MDL-1096 No. CIV.A.M-97-064, 1999 WL 33305652, at *3-*7 (S.D. Tex. Aug. 10, 1999); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 497-98, 503 (S.D. Ill. 1999); *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 WL 415390, at *4, *8 (E.D. Pa. June 21, 1999); *Chilton Water Auth. v. Shell Oil Co.*, No. CIV.A.98-T-1452-N, 1999 WL 1628000, at *7-*8 (M.D. Ala. May 21, 1999); *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 319-20 (S.D. Fla. 1998); *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 402-03 (D.N.J. 1998); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 465 (D.N.J. 1998); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 339-41 (N.D. Miss. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. at 222-26; *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 368 (N.D. Ill. 1998); *Borskey v. Medtronics*, No. CIV.A.94-2302, 1998 WL 122602, at *3 (E.D. La. Mar. 18, 1998); *Peoples v. Am. Fid. Life Ins. Co.*, 176 F.R.D. 637, 646 (N.D. Fla. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 370-72, 376 (E.D. La. 1997); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 23 & nn.10-12 (D. Conn. 1997); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 587-88 (M.D. Ala. 1997); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347-52 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 215-17 (E.D.N.C. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94-96 (W.D. Mo. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341-42 (N.D. Ill. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-27 (E.D. La. 1997); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 629-30 (D. Kan. 1996); *Barbarin v. Gen. Motors Corp.*, No. CIV.A.84-0888,

these circumstances, it is unsurprising that one federal district court judge could confidently report that "no federal court has [ever] attempted to try a case under the laws of every state." *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 WL 415390, at *6 n.11 (E.D. Pa. June 21, 1999) (quotations and citations omitted).

In order to certify a nationwide litigation class here, the district court ignored this consistent precedent, misread Indiana choice-of-law rules, and applied a novel interpretation of Tennessee law to all claims of all consumers nationwide against Firestone. The Seventh Circuit's ruling reversing that erroneous and unprecedented decision was unexceptional, and does not deserve review.

II. PLAINTIFFS' CHALLENGES TO THE SEVENTH CIRCUIT'S SUPERIORITY ANALYSIS ARE BASED UPON DISTORTIONS OF THE SEVENTH CIRCUIT'S DECISION

Plaintiffs' second, third, and fourth questions presented, which challenge supposed aspects of the Seventh Circuit's superiority ruling, are based upon misinterpretations of the Seventh Circuit's decision. None of those questions accurately reflects the decision below, and none warrants review by this Court.

A. The Seventh Circuit Did Not "Usurp" State Law-making Power In Violation Of *Erie v. Tompkins* Or Settled Principles Of Federalism

Plaintiffs contend that the Seventh Circuit decision reversing class certification somehow overruled or overrode state law that would permit recovery by plaintiffs who have suffered actual economic losses. Pet. 19-25. The court did no such thing.

1993 WL 765821, at *3 (D.D.C. Sept. 22, 1993).

Plaintiffs' argument is based upon a contrived reading of the Seventh Circuit decision and a misleading characterization of their claims. To begin with, plaintiffs strive mightily to find an *Erie* issue in the Seventh Circuit's rulings. There is none. The Seventh Circuit ruled on the requirements for application of Rule 23—a federal procedural rule—and in that context assessed the variability of the laws of the 51 jurisdictions at issue.

Second, plaintiffs seek to cast their own allegations as routine economic loss claims, asserting, for example, that no state would deny a breach of warranty claim "because of the absence of physical harm." Pet. 21. But plaintiffs' assertion of such obvious points ignores the novel theory they seek to press—a claim for damages where the product owned by the plaintiff has functioned without incident, but a tiny fraction (fewer than one percent) of products owned by others have failed.

Thus, in the course of analyzing whether Tennessee law could be applied to the propensity-to-fail, no-injury claims of class members around the nation, the Seventh Circuit acknowledged plaintiffs' position that their claims are not based on a product-liability theory. Pet. App. 5a-6a. The Seventh Circuit also recognized plaintiffs' assertions about breach of warranty and fraud, but expressed doubts about the strategy, observing that "most states would not entertain" a theory under which a consumer whose product has performed without incident, and who therefore got substantial uninterrupted use from the product, can nevertheless sue for damages. *Id.* 7a. But the Seventh Circuit's statement was made in the context of evaluating plaintiffs' claims to determine which states' laws would apply and whether those laws varied. *Id.* Thus, in observing the state of "no-injury/no-manifestation" law, the Seventh Circuit did not purport to supplant state law. Nor did it even *predict* state law in a manner that implicates *Erie*. The court did not definitively determine *any* particular state's law relating to plaintiffs'

claims, and it certainly did not purport to overrule or undermine the actions of any state court or legislature in defining the substance of any particular state's laws. It merely cited to existing case law on the issue. Thus, when the actual opinion is examined, plaintiffs' rhetoric about the court having "accreted to itself . . . the power to judge the wisdom of state lawmakers in creating various causes of action" (Pet. 20) rings hollow.[14]

Furthermore, the Seventh Circuit's observation about the state of "no-injury/no-manifestation" law was absolutely correct. The observation was based upon decisions from four federal appellate courts and four state courts.[15] And although

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[14] Plaintiffs take issue with Judge Easterbrook's observations about the economic effects of competing legal rules. *E.g.*, Pet. 20, 23. While Judge Easterbrook's analysis (*see* Pet. App. 6a & n.1) is correct, it is also dictum, and does not rise to something reviewable by this Court. *See California v. Rooney*, 483 U.S. 307, 311-14 (1987) (per curiam); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

[15] Plaintiffs' attempt to distinguish the case law cited by the Seventh Circuit is unavailing. Plaintiffs do not even address two of the cases, *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Ct. App. 1995), and *Yu v. IBM Corp.*, 732 N.E.2d 1173 (Ill. App. Ct. 2000). *Cf.* Pet. App. 7a. In *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999), the Eighth Circuit ruled that "[w]here . . . a product performs satisfactorily and never exhibits an alleged defect, *no* cause of action lies." *Id.* at 628 (emphasis added). Similarly, in *Angus v. Shiley, Inc.*, 989 F.2d 142 (3d Cir. 1993), and in *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094 (5th Cir. 1991), plaintiffs with properly functioning artificial heart valves sought recovery because artificial heart valves implanted in other people had failed. Both courts of appeals refused to recognize such claims. *Angus*, 989 F.2d at 148; *Willett*, 929 F.2d at 1099-1100 & n.20. In *Carlson v. General Motors Corp.*, 883 F.2d 287 (4th Cir. 1989), plaintiffs sought recovery under the implied warranty of merchantability for loss of vehicle resale value due to mechanical failures of GM diesel engines in *other* people's automobiles. The Fourth Circuit called this theory "novel" and affirmed the district court's dismissal of those no-injury claims. *Id.* at 297-98. In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the Supreme Court of Kentucky rejected plaintiffs' no-injury negligence

plaintiffs assert that "it is incontrovertible that states *do* provide such causes of action for purchasers of defective products who have not (or not yet) been physically injured" (Pet. 23), that assertion, like the one quoted above, is off the mark. The question is the variability of a "no-injury" claim; on that, plaintiffs plainly did not persuade the Seventh Circuit, and do not cite any case law in the petition showing that states have uniformly adopted a propensity-to-fail approach like plaintiffs assert here. In fact, they have not.[16]

The Seventh Circuit did, in fact, conclude that the NHTSA process was superior to the district court's nationwide class

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claims and held that "with a substance capable of causing cancer, *just as with any other defective product, no cause of action accrues until the potentially harmful exposure actually 'causes injury that produces loss or damage.'*" *Id.* at 192 (emphasis added) (citation omitted). And in *Ford Motor Co. v. Rice*, 726 So. 2d 626, 631 (Ala. 1998), the Alabama Supreme Court explicitly noted that "courts have generally concluded that claims based upon allegations of inherent product 'defects' that have not caused any tangible injury are not viable." *Id.* at 629. Thus, each of the cases cited by the Seventh Circuit supports the proposition that consumers who bought and received tires that functioned without incident for thousands of miles of actual use have no injury and no viable claim.

Indeed, numerous other cases not cited by the Seventh Circuit support the same basic principle that people whose products function without incident cannot recover on the theory that a small number of products owned by other people have failed. *See, e.g., In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 806 & n.21 (E.D. La. 1998); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99-100 (S.D.N.Y. 1997); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982).

[16] Plaintiffs err in relying (Pet. 22) on *Coughlin v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 (5th Cir. 2001). That case did not purport to rule that courts around the nation permit recovery by plaintiffs whose products have performed without incident. Furthermore, *Coughlin* is inapposite: it dealt with someone who thought he had bought a boat made of one material, then found out that it was made of another. 240 F.3d at 451. By contrast, plaintiffs here thought they were purchasing—and did in fact purchase—tires that would function without incident for thousands of miles.

action, which was based upon announcing new law (by finding that Tennessee and Michigan would permit "no-injury/no-manifestation" claims to proceed), declaring that law to control all of the claims of consumers throughout the land, and then applying that law to facts that varied materially from purchaser to purchaser.[17] In doing so, the Seventh Circuit aligned itself with numerous other courts that have found the NHTSA process to be superior to sprawling and unmanageable class actions by those whose products have performed without incident. *See, e.g., Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998) ("the administrative remedy provided by NHTSA . . . is more appropriate than civil litigation seeking equitable relief and money damages in a federal court"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 353 (D.N.J. 1997) (same).[18]

Finally, plaintiffs' assertion of some sort of conflict between the Seventh Circuit's ruling and *Hanlon* or *School Asbestos* on this issue (Pet. 24) is frivolous. Neither *Hanlon* nor *School Asbestos* addressed whether the NHTSA process is superior to a nationwide class action lawsuit by those whose products have performed without incident, and whose claims would therefore be subject to dismissal under many, if not all, states' laws.

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[17] Neither Tennessee nor Michigan case law authorized plaintiffs to proceed with warranty-based claims, unjust enrichment claims, or consumer fraud claims when the product at issue had performed without incident. No Tennessee or Michigan court had recognized plaintiffs' novel, propensity-to-fail theory of product defect. And plaintiffs had not cited a single federal nationwide litigation class action of no-injury product defect claims that would serve as a model for litigation.

[18] *Accord, e.g., Feinstein*, 535 F. Supp. at 607 n.18; *Frank v. Daimler/Chrysler Corp.*, 741 N.Y.S.2d 9, 17 (App. Div. 2002); *Ford Motor Co. v. Magill*, 698 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 1997); *Am. Suzuki Motor Corp.*, 44 Cal. Rptr. 2d at 531-32.

B. The Seventh Circuit's Treatment Of Plaintiffs' Allegedly "Negative-Value" Claims Does Not Conflict With The Law Of This Court Or Any Circuit

Plaintiffs also err in suggesting that the Seventh Circuit held that small-value claims weighed against class certification. Pet. 25-29. Again, the Seventh Circuit did nothing of the sort.

At the threshold, plaintiffs' claims are not "negative-value" claims. Attorneys' fees provisions in most consumer fraud statutes provide ample incentive to ensure that, if a claim has merit, it will be pursued. *See, e.g., Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 456 (E.D. Pa. 2000) (ability to recover attorneys' fees belies the projected problems of a negative value suit); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 375 (E.D. La. 1997) (same).

The Seventh Circuit, however, did not address whether plaintiffs' claims were large- or small-value. It did not take the *small* value of plaintiffs' claims "as a basis for finding that a class action would *not* be superior . . . ." Pet. 26 (emphasis in original). Rather, the court recognized that the *novel* and *speculative* nature of plaintiffs' claims—the fact that purchasers' products "have so far performed properly," and whose owners seek compensation based only on "the *risk* of failure, which may be reflected in diminished resale value . . . and perhaps mental stress" (Pet. App. 2a) (emphasis in original)—made class certification inferior to alternatives. In deciding that plaintiffs' claims could proceed, the district court had broken new ground. The district court had no precedent—from Tennessee, Michigan, or otherwise—showing how a class action asserting such novel claims could be tried. The district court was thus essentially flying blind, and any assessment of manageability or superiority was pure speculation.

As a result, the Seventh Circuit properly found that a class action would not satisfy the superiority requirement of Rule 23(b)(3). That ruling is consistent with other courts that have addressed the issue. "In the context of an immature" legal theory, "any savings in judicial resources is speculative." *Castano*, 84 F.3d at 749; *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (finding plaintiffs' theory that siding is "prone to fail . . . runs into *Castano*'s admonition not to certify novel tort classes"); *see also, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 494-95 (E.D. Pa. 1997).

In any event, the supposed "negative value" of plaintiffs' claims does not change the analysis under Rule 23(b)(3). The rule does not distinguish between litigation involving large and small claims, and courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted . . . ." *Amchem*, 521 U.S. at 622. None of the cases cited by the plaintiffs (Pet. 25-27) held that either Rule 23 standards or appellate scrutiny of any particular consumer class action should be any less demanding because of the type or size of the claims. And "the negative value of [a] case cannot justify the headlong plunge into an unmanageable and interminable litigation process . . . ." *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194, 199 (D.P.R. 1998); *Masonite*, 170 F.R.D. at 426-27 ("the magnitude or kind of injury does not make these claims, by virtue of their character, any the more suitable for class management"). Thus, the courts of appeals have not hesitated to reverse class certifications of supposed "negative-value" claims. *See, e.g., Spence v. Glock*, 227 F.3d 308, 314-16 (5th Cir. 2000) (reversing class certification of numerous small-value common-law claims); *Andrews*, 95 F.3d at 1023-25 (reversing class certification of small-value RICO claims); *In re LifeUSA*, 242 F.3d at 148 n.13 (rejecting "relatively modest" common-law claims, noting that size of claims is "insufficient to overcome the hurdles of predominance and superiority").

C. The Seventh Circuit's Assessment Of The District Court's Misguided View Of Litigation "Efficiency" Does Not Conflict With The Law Of Any Other Court

Plaintiffs further err in suggesting that the Seventh Circuit interpreted the word "efficient" in Rule 23(b)(3) in a manner that conflicts with the law of other courts. Pet. 27-30. Again, that argument rests on a fundamental misreading of the Seventh Circuit's opinion.

The Seventh Circuit recognized that the district court's proposed class action was a litigation nightmare, in which novel theories would have to be assessed under a variety of different legal standards and then applied to countless individualized factual circumstances. The district court was determined to proceed despite these problems. Pet. App. 11a-13a. This approach, according to the Seventh Circuit, valued "central planning" over the ordered development of the law by those entities primarily charged with deciding the law of the states—namely, the states themselves. *Id.* According to the Seventh Circuit, "[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *Id.* 12a (citing *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 568-73 (1996)). That view is unassailable, and does not conflict with the law of this Court or any other jurisdiction. None of the cases cited by the plaintiffs (Pet. 27-30) hold, or even suggest, that a court can override substantive law or ignore issues of fairness in an attempt to achieve "efficiency."

Indeed, plaintiffs' arguments ignore the text of Rule 23, which requires that class certification be superior to other mechanisms for the "*fair and* efficient" resolution of the controversy. Rule 23(b)(3) (emphasis added). Just as the district court had done, plaintiffs focus entirely on speed, costs, and available resources. The Seventh Circuit's analysis

confirms, as it should, that speed and cost savings alone cannot justify class certification. Fairness is critical. That analysis is consistent with decisions of this Court and other federal courts of appeal. *See Amchem Prods.*, 521 U.S. at 615; *Zinser*, 253 F.3d at 1192; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998); *In re Am. Med. Sys.*, 75 F.3d at 1085.

III. THE SEVENTH CIRCUIT'S RULING THAT INDIVIDUAL FACTUAL ISSUES PREDOMINATE PROVIDES FURTHER GROUNDS FOR DENYING REVIEW

In addition to its choice-of-law and superiority rulings, the Seventh Circuit held that individualized factual issues predominate, preventing certification of even a statewide class action. Pet. App. 9a-11a. This additional holding makes this case unsuitable for *certiorari* review, since the nationwide class proposed by the plaintiffs cannot proceed in any event.

The district court held, and plaintiffs conceded, that all of their claims depend upon showing that all of the tires in the Tire Class are defective. Pet. 5. Proving defect would require examining how the tires were designed, how they were used, and how they performed over time. The record before the district court and the Seventh Circuit demonstrated that the millions of tires in the Tire Class differed in design, use, and performance—confounding any classwide proof of defect.

The proposed Tire Class put at issue 60 million tires, manufactured over more than ten years. Plaintiffs' own submission to the district court illustrated that the multiple different tires in the Tire Class were manufactured to scores of different design specifications. Unrefuted evidence showed that those specifications created tires with different sizes, different vehicle applications (*i.e.*, SUVs versus pick-up trucks), and different performance characteristics.

The NHTSA investigation underscored that tires in the Tire Class differed materially in design. NHTSA investigated these tires for eighteen months. Firestone recalled 14 million of the 60 million investigated tires in August 2000. Upon completion of its investigation, NHTSA determined that only about 3.5 million additional tires should be replaced, and Firestone promptly complied. NHTSA did not think the rest of the tires—more than 40 million—required recall.

Furthermore, even if all the tires had been identical, the evidence established that individual issues still would predominate. The circumstances of each class member's purchase and use of the tires are unique. As but one example, tire purchasers used their tires for differing periods of time and differing mileage, with many or most receiving full usage for the expected lifetime of their tires. Evidence of actual use would be relevant to issues such as the existence (or absence) of a defect, merchantability, and the existence (if any) of an injury.

Against this backdrop, the Seventh Circuit properly recognized that the district court had abused its discretion by ignoring record evidence showing that there was no factual predominance. Pet. App. 9a-11a. The Seventh Circuit noted the legal significance of only a limited number of the tires being recalled (*id.* 10a), the fact that most tires were not designed for Explorers (*id.*), and the different design specifications put at issue (*id.*). The district court had not even attempted to reconcile its predominance ruling with those facts—let alone the rest of the record. Nor had the district court explained how the claims relating to the 60 million different tires could be fairly or manageably tried in a single, all-or-nothing trial.

For these reasons, the Seventh Circuit properly found that class certification—even on a statewide basis—was impossible. *Id.* 9a. This renders the questions presented in the petition ultimately superfluous: wholly apart from the Seventh

Circuit's manageability and superiority rulings, this case could not proceed as a class action because individual issues of fact predominate. Thus, if this Court were inclined to review questions like those presented in plaintiffs' petition, it should await a more appropriate case for doing so.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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Dated: December 6, 2002

No. 02-530

IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, *et al.*,
Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT FORD MOTOR COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The court of appeals held that this proposed nationwide class action fails to satisfy the commonality and manageability requirements of Rule 23 because the materially different laws of 51 jurisdictions would apply to the claims of putative class members, and because the many different configurations of tires and vehicles at issue precluded uniform, classwide treatment of all tires and vehicles. The questions presented are:

1. Whether certiorari should be granted to review the court of appeals' determination that, under Indiana choice-of-law rules, petitioners' tort and contract claims would be governed by the laws of the 51 jurisdictions in which the claimants' vehicles were purchased and used, rather than by the laws of the manufacturers' home states.

2. Whether certiorari should be granted where petitioners fail to seek review of the court of appeals' independently dispositive holding that variations among the tires and vehicles at issue preclude the finding of factual commonality necessary to adjudicate petitioners' product defect claims on a classwide basis.

RULE 29.6 DISCLOSURE

Respondent Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition for certiorari in this case is entirely without merit. Petitioners all but ignore the essence of the decision below: a straightforward, uncontroversial application of the choice-of-law rules of Indiana. The court's core holding turns entirely on that purely state-law issue, and nothing about it warrants review by this Court.

The choice-of-law issue arose when petitioners filed in the U.S. District Court for the Southern District of Indiana a master complaint seeking certification of two nationwide classes of purchasers of Ford vehicles and Bridgestone/Firestone tires. The complaint alleged tort and contract claims for economic injuries suffered "at the instant" petitioners purchased their vehicles and tires in the 50 states and the District of Columbia. Pet. 4. That presented a serious problem for class certification. Under Indiana's unexceptional choice-of-law rules, petitioners' consumer purchase claims would be governed by the law of the place of purchase – here, by the laws of every United States jurisdiction. And because the relevant tort and contract laws vary substantially across jurisdictions, it was evident that petitioners' could not satisfy the requirements of Rule 23(a) and Rule 23(b)(3) that the claims in the class present predominately common legal issues.

Petitioners attempted to argue that the tort and contract laws of all 51 jurisdictions are sufficiently similar to satisfy Rule 23's legal commonality requirements. The district court rejected that argument. But petitioners also suggested an alternative route to commonality: a bizarre reading of Indiana choice-of-law rules that would make the law of the manufacturer's home jurisdiction applicable to any tort or contract claim arising out of a consumer purchase, such that, for example, Korean law would govern the sale of a Hyundai in Indiana. Surprisingly, the district court accepted that reading, and held that the law of each respondent's home state

would govern every claim against each respondent, regardless where the vehicle or tire was purchased.

On expedited appeal, a unanimous Seventh Circuit panel corrected that obvious error, holding that under Indiana choice-of-law rules, the laws of the state in which a product was purchased must be applied to tort and contract claims arising out of the purchase. Thus the laws of not just one jurisdiction, but of all 51, would apply to the class claims against each respondent. Because the Seventh Circuit agreed with the district court that those different sets of laws varied too much to allow for nationwide class treatment of petitioners' claims, it held that the class certification order was erroneous.

To forestall further litigation in the district court and another appeal over whether 51 statewide classes would be proper, the court of appeals went on to address respondents' other objections to the class certification order. The court of appeals agreed with respondents that factual variations among the claims of individual class members – including differences in the configurations of the individual vehicles and tires at issue, differences in usage patterns, and differences in purchase circumstances – rendered the claims insufficiently common in their factual dimensions to justify treatment on a classwide basis, even if common questions of law had predominated. Finally, the court of appeals cautioned courts not to repeat the district court's error of dispensing with Rule 23's important legal and factual commonality requirements merely to avoid hundreds of smaller, individual claimant cases in multiple jurisdictions.

The decision of the court of appeals could hardly be more fact-bound or state-law intensive. To the extent that the decision below rests on federal-law premises, those premises are entirely uncontroversial: all circuits agree with *both* courts below that nationwide class actions must be premised on laws that do not differ materially, and all cir-

cuits agree with the court of appeals that the fundamental requirements of Rule 23 cannot be disregarded simply to avoid multiple trials on small-value claims. Certiorari should be denied.

OPINIONS BELOW

The petition's recitation of the relevant opinions below omits mention of the district court opinion setting forth the choice-of-law ruling that is the focus of the decision below. Nor is the opinion attached as an appendix to the petition. That opinion is reported at 155 F. Supp. 2d 1069 (S.D. Ind. 2001), and attached as an appendix ("App. A") hereto.

STATEMENT OF THE CASE

1. This action began with an investigation by the National Highway Traffic Safety Administration ("NHTSA") in May 2000 into the safety of certain tires manufactured by respondent Bridgestone/Firestone, Inc. ("Firestone"). Within weeks after Firestone announced a recall of some of the investigated tires in August of that year, over 100 purported class actions were filed against Firestone in state and federal courts around the country alleging that both recalled and unrecalled tires were defective. These lawsuits soon included Ford Motor Company ("Ford") as a defendant, and the complaints added a distinct set of allegations that all Ford Explorers (the primary vehicle model on which the recalled tires were installed) were defective because they were unreasonably prone to rollover accidents.[1] These cases generally

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[1] In May 2001, Ford launched a voluntary program to replace, free of charge, all of the remaining investigated tires that were sold as original equipment on Explorers and other Ford vehicles. Firestone agreed to replace another 3.5 million tires in October 2001 after NHTSA issued a preliminary defect determination regarding those tires. Several months ago, NHTSA considered and rejected the types of allegations asserted by plaintiffs against Ford. After an "extensive analysis of agency data and information provided by Ford and Firestone," NHTSA conclusively rejected the claim that "Explorers are defectively designed because they

excluded any individuals who had actually suffered personal injury allegedly attributable to the alleged defects. Instead, the theory of the lawsuits was that product purchasers who had not suffered any personal injury, or even any manifestation of the asserted product defect (i.e., a tread separation or rollover event), had still suffered an economic injury in the form of "overpayment" for their products. *See* Pet. 4.

2. All of the actions pending in federal courts were transferred to the Southern District of Indiana under the multi-district litigation ("MDL") statute, 28 U.S.C. § 1407.[2] In January 2001, petitioners filed a master complaint in the district court combining the allegations of the class actions consolidated there. The master complaint listed 235 named plaintiffs suing on behalf of themselves and multiple putative classes and subclasses and asserted 14 distinct legal claims under state and federal law premised upon various allegations of product defect, misrepresentation, and omission.

a. Respondents moved to dismiss the master complaint. To rule on that motion, the district court was required to determine what law to apply to claims arising out of purchases in many different state jurisdictions. Applying the settled rule that "before 'entangling itself in messy issues of conflicts of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states,'" App. 4a (quoting *Jean v. Dugan*, 20 F.3d 255, 260 (7th Cir. 1994)), the court held that "the relevant substantive laws . . . are sufficiently different to require a choice of law analysis," *id.*

To conduct that analysis, the court purported to follow

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have an inadequate margin of control for an average driver following a tread separation incident." Press Release, NHTSA, "NHTSA Denies Firestone Request for Ford Explorer Investigation" (Feb. 12, 2002).

[2] Several putative class actions asserting similar claims on behalf of similar classes remain pending in various state courts.

the choice-of-law rules of Indiana, the forum state for the master complaint. *Id.* at 5a; *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Indiana courts apply a version of the familiar *lex loci delicti* test to determine the law applicable to tort claims: the law of the "place of injury" governs, unless that place is "insignificant" to the tort. Pet. App. 4a (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987)); *see Land v. Yamaha Motor Corp.*, 272 F.3d 514, 516 (7th Cir. 2001); *Judge v. Pilot Oil Corp.*, 205 F.3d 335, 336-37 (7th Cir. 2000). Even though the place of injury for petitioners' tort claims was the place where the product was purchased – which is also where most purchasers resided, where price negotiations would have occurred, where point-of-sale advertising would have been placed, and where the product was to be used – the district court held that the place of purchase was "insignificant" to the purchase-based injury asserted by petitioners. App. 9a. Deciding that the "conduct of Defendants as manufacturers" was the only issue significant to petitioners' claims, the court held that the laws of each respondent's home state would apply to all tort claims, regardless of where the product was purchased and regardless of how that state's law would treat the purchase transaction. *Id.* at 12a-13a. Applying Michigan law to the claims against Ford and Tennessee law to the claims against Firestone, the court dismissed most, but not all, of the tort claims.

Indiana courts apply the RESTATEMENT (SECOND) OF CONFLICT OF LAWS choice-of-law rule for contract claims: the law that governs is the law of the state with the most "intimate contacts" to "the transaction," as determined by such factors as the place of contracting, negotiating, and performance, location of the transaction's subject matter, and locations of the parties. *Nucor Corp. v. Aceros y Maquilas de Occidente*, 28 F.3d 572, 581-83 (7th Cir. 1994) (citing *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945)); *see Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855

F.2d 406, 412-13 (7th Cir. 1988). Even though essentially all those factors directly point to the law of the place of purchase, the district court again ruled that the laws of each respondent's home state would apply to the contact claims against it. App. 15a-16a. Applying those laws, the court declined to dismiss any of the contract claims.

b. Several months later, the court issued an order on class certification. That order certified *three* nationwide breach-of-warranty/fraud classes. One class consisted of all current U.S. residents who owned or leased variously configured Ford Explorer models during the period 1991 to 2000. A second class consisted of all current U.S. residents who during the same period owned or leased vehicles of any kind equipped with a broad array of Firestone tires. A third, overlapping subclass consisted of all current U.S. residents who owned or leased Ford Explorers equipped with any of a wide variety of Firestone tires. *See* Pet. App. 73a-74a. The court rushed out its order "in aid of its jurisdiction," in an explicit effort to preclude a South Carolina state court from certifying a class of "South Carolina owners of Explorers equipped with Firestone tires." *Id.* at 72a n.1.

Over a month later, the court issued an opinion explaining its order. *Id.* at 14a. The court began its opinion by observing that the "choice of law determination" set forth in its earlier partial dismissal order "is an important element of the class certification analysis," and incorporated it by reference into the class certification opinion. *Id.* at 16a. Recognizing that the Seventh Circuit would have the opportunity to review the choice-of-law determination "as part of an appeal of the class certification ruling," the court rejected a request by Firestone for certification of an immediate interlocutory appeal of the choice-of-law ruling. *Id.*

The court made clear its view that Rule 23 was satisfied only because of its choice-of-law conclusion. Having already determined that the relevant laws of the various states

differ materially, App. 4a, the district court acknowledged that "common issues of law predominate" only *because* "all class members claims will be governed by the laws of Michigan and Tennessee," Pet. App. 40a n.17. "Due to our earlier choice of law decision," the court added, "this case does not involve the numerous subclasses on the basis of state law variation that plague the pursuit of class certification in many cases." *Id.* at 67a n.45. Applying one state's law to every claim against each respondent, the court determined that common issues of law predominated enough to satisfy Rule 23. *Id.* at 40a-60a.

The court reached the same conclusion with respect to common issues of fact. The court recognized that because petitioners' theory of economic injury in their claims against Ford turned entirely on whether Explorers are defective, *see* Pet. App. 40a (stating that petitioners' theory requires them to "prove that the products Defendants sold were defective and that the prices they paid for their products were therefore too high"), the key question on factual commonality was whether petitioners had advanced a defect theory that they could prove on evidence "applicable to all Explorers," *id.* at 42a. The one theory advanced by petitioners was that the so-called "Static Stability Factor" ("SSF") for Explorers is too low, while their "oversteer" is too high, creating an unreasonable propensity to roll over. Ford submitted evidence, wholly unrebutted by petitioners, establishing that SSF and oversteer vary substantially among the 44 different Explorer configurations at issue. Defs.' 7th Cir. Jt. App. 435-36, 461-80. The court nevertheless concluded that petitioners could prove an SSF/oversteer rollover defect on evidence common to every one of the Explorer configurations, pointing to evidence that Ford itself had allegedly treated Explorers similarly for certain purposes, Pet. App. at 42a-43a, though *none* of that evidence showed that Ford treated all Explorers the same with respect to their *SSF* or *oversteer* characteristics.

Having satisfied itself of legal and factual commonality, the district court concluded by addressing the question of "superiority" under Rule 23(b)(3). The court's analysis was guided by the firm belief that centralization of all claims in one forum would be the most efficient approach:

> In our view, class certification is the most appropriate means of continuing this litigation. As Plaintiffs note, without class certification, if individual Plaintiffs wish to continue pursuing their claims, either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. . . . Such a result would be immensely burdensome to the courts, parties, and witnesses. This would also create the risk of inconsistent results. And while these multitudinous lawsuits are clogging the courts, other litigants must wait and wait and wait.

Pet. App. 66a. The court concluded its opinion by holding that NHTSA's administrative mechanisms were not superior to centralization of all claims in the MDL proceeding, on the palpably incorrect ground that NHTSA has insufficient remedial power to resolve economic losses arising from alleged vehicle defects. *Id.* at 70a.[3]

3. Respondents petitioned for interlocutory review of the certification order under Rule 23(f). The Seventh Circuit granted review and promptly reversed.

a. The first ground for reversal was that the district court had erred as a matter of Indiana law in applying the law of

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[3] NHTSA is the federal agency specifically charged by Congress with identifying and remedying vehicle defects. If NHTSA finds a defect in a vehicle, NHTSA can force the manufacturer to repair the defect (eliminating any economic loss), to replace the vehicle with one that is defect-free (eliminating any economic loss), or to buy back the vehicle (eliminating any economic loss). *See* 49 U.S.C. §§ 30118-30120.

respondents' principal place of business, rather than the law of the place of purchase, to all the class claims. The court, per Judge Easterbrook, concluded that "[n]either Indiana nor any other state has applied a uniform place-of-the-defendant's-headquarters rule to products liability cases." Pet. App. 5a. Applying Indiana contract and consumer protection precedents holding that the sale of products within Indiana is governed by Indiana law (as opposed to the law of seller's home state), the court concluded that Indiana's "choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits." *Id.* at 8a.[4]

That conclusion left the question whether the 51 different state laws were sufficiently dissimilar that certification was precluded under Rule 23's legal commonality and manageability standards. The Seventh Circuit identified an analytical flaw in petitioners' "economic-injury-only" theory, *id.* at 6a & n.1, and observed that, because of the flaw, "most states would not entertain the sort of theory that plaintiffs press," *id.* at 7a (citing cases rejecting theory under laws of ten different states). The court did not address the merits of this theory under the laws of every state; rather, it was enough for purposes of its Rule 23 holding that "state laws about theories such as those presented by our plaintiffs differ," *id.* at 3a, as the district court had expressly held. Following numerous precedents rejecting the certification of other nationwide classes on the basis of state-law variations in the warranty and fraud claims asserted, *id.*, the court of appeals held that a proper application of Indiana choice-of-law rules compelled reversal of the class certification order, *id.* at 9a ("Because these claims must be adjudicated under

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[4] Were it otherwise, the court observed, Indiana would have to apply Korean law to the sale of a Hyundai car in Indiana, and French law to the sale of a Michelin tire in Indiana, an inconceivable result. Pet. App. 7a-8a.

the law of so many jurisdictions, a single nationwide class is not manageable.").

b. After correcting the district court's error of state law, the court turned to issues of factual commonality. *Id.* at 9a. Pointing to undisputed variations in the configurations, attributes, and purchase and use circumstances of the various vehicles and tires, *id.* at 9a-10a, the court held that those differences, as well as others too numerous too mention, "preclude any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy,'" *id.* at 10a-11a (quoting Fed. R. Civ. P. 23(b)(3)). Given such a lack of legal or factual commonality sufficient to satisfy Rule 23, the court concluded that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone." *Id.* at 11a.

c. The court of appeals concluded with three paragraphs responding to the district court's assertion that centralization of all claims in a single forum, for all-or-nothing resolution by a single lay jury, is more efficient than resolution through multiple, smaller trials or through NHTSA's administrative procedures. According to the court of appeals, the district court was wrong to believe that "efficiency" required the litigation to be centralized despite significant legal and factual variations among the claims. It is the "model of the central planner," the court observed, to ignore local legal and factual variation in favor of a one-size-fits-all resolution:

> The central planning model – one case, one set of rules, one settlement price for all involved – suppresses information that is vital to accurate resolution. What *is* the law of Michigan, or Arkansas, or Guam,

> as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from the state courts.

Id. In many situations, the court suggested, a "decentralized process" of multiple individual trials with different juries under different legal rules will lead to the more sensible social resolution. *Id.* at 12a (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)).

But even if one objects to the "decentralized approach as an original matter," the court explained, *id.*, the fact is that both Rule 23 and principles of federalism forbid courts from centralizing millions of individual claims on a nationwide basis when there is legal and factual variation among the claims: "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and they must not be overridden in a quest to clear the queue in court. . . . Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)." *Id.* at 12a-13a.

Concluding that the district court had essentially altered Indiana choice-of-law doctrine to reach a legal commonality conclusion that would facilitate class treatment, the court of appeals reversed the certification order. Petitioners sought en banc review of the panel's unanimous decision; not one judge of the Circuit voted to review the decision.

4. In the wake of the Seventh Circuit's decision decertifying the classes, the so-called "negative value" of individual claims has not led to their withdrawal or demise, contrary to the ominous warnings of the petition. Indeed, petitioners recently submitted a proposal to the district court seeking trial on the individual claims of eleven plaintiffs.

REASONS FOR DENYING THE PETITION

The foregoing Statement, standing alone, amply demonstrates why the petition should be denied. Fundamentally, this is a case about the application of state choice-of-law rules. Nothing in the Seventh Circuit's holding or analysis is remotely controversial. Petitioners seem to recognize this, and do their best to ignore the holding and its true rationale. They propose four questions for review, all of which are drawn primarily from the opinion's more colorful rhetoric, and none of which addresses either the ruling on Indiana state conflicts law, or the ruling on factual commonality. The court's ruling on the state-law conflicts issue, of course, is no basis for certiorari. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Black v. Cutter Labs.*, 351 U.S. 292, 298-99 (1956); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938); *see generally* Robert L. Stern et al., *Supreme Court Practice* 226 (8th ed. 2002). Nor is its intensely fact-bound, case-specific determination that the many different vehicle and tire configurations involved in the class claims present individuated factual issues too varied to permit common, all-or-nothing, classwide adjudication. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Stern et al., *supra*, at 249. And whatever petitioners have to say about additional language in the opinion, "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311-14 (1987) (per curiam) (quoting *Black*, 351 U.S. at 297); *see Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

Because petitioners do not even purport to seek review of the dispositive factual commonality ruling below, review of the questions petitioners do present could not change the result below. Certiorari should be denied for that reason alone.

See Stern et al., *supra*, at 231. But even on their own terms, none of petitioners' Questions Presented offer any basis for granting certiorari. The petition should be denied.

I. THE COURT OF APPEALS' LEGAL COMMONALITY DETERMINATION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The first Question Presented in the petition attacks the court of appeals' observation that "[n]o class action is proper unless all litigants are governed by the same legal rules." Pet. App. 3a. According to petitioners, that statement announces a rule that all litigants must be governed by *literally* the *exact same* rules before a class may be certified. In fact, of course, the opinion simply applies the wholly uncontroversial rule, previously articulated on numerous recent occasions by Judge Easterbrook himself, that if "recovery depends on law that *varies materially* from state to state," a nationwide litigation class cannot be certified. *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 746-47 (7th Cir. 2001) (citing *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001) (per Easterbrook, J.), *cert. denied*, 122 S. Ct. 1607 (2002); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (per Easterbrook, J.), *cert. denied*, 534 U.S. 951 (2002); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.) (per Posner, J.), *cert. denied*, 516 U.S. 867 (1995); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-34 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are *sufficiently cohesive* to warrant adjudication by representation." (emphasis added)). As the court of appeals observes immediately after the sentence quoted by petitioners: "State laws about theories such as those presented by our plaintiffs differ, and such differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes." Pet. App. 3a (citing *Mexico Money*, *Isaacs*, *Szabo*, and *Rhone-Poulenc*).

Importantly, the district court itself reached just the same conclusion, holding that the relevant state laws – if applicable under choice-of-law principles – differ too significantly to permit class certification. *Supra* at 6-7. The central question before the court of appeals was simply whether, as a matter of Indiana choice-of-law rules, each respondent's home-state law applied to all class claims – the ruling that the district court believed was the only way to establish legal commonality. When the court of appeals held that the district court's choice-of-law analysis was erroneous, the conclusion that the class claims lacked sufficient cohesiveness followed as a matter of course.

The court's state-law choice-of-law ruling is both unassailable and all but unreviewable. *See supra* at 12. Petitioners are therefore forced to argue that the conclusion of *both* lower courts that the tort and contract laws of the 51 relevant jurisdictions differ too significantly to satisfy the Rule 23 legal commonality requirement conflicts with decisions of other circuits. Petitioners are quite wrong.

The decision below is fully consistent with the broad consensus among the federal circuits that, outside of the settlement context, legal variations in different states' tort and contract laws typically preclude findings of commonality, predominance and manageability in nationwide and multistate class actions.[5] These conclusions are, of course, largely

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[5] *E.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir.), *cert. denied*, 123 S. Ct. 117 (2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 565-66 (5th Cir. 2002); *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 n.13 (3d Cir. 2001); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187-90 (9th Cir. 2001); *Szabo*, 249 F.3d at 674; *Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313-15 (5th Cir. 2000); *In re Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368-69 (E.D. La. 1997), *aff'd mem. sub nom. Bates v. Ford Motor Co.*, 174 F.3d 198 (5th Cir. 1999); *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1024-25 (11th Cir. 1996); *In re Am. Med. Sys.*, 75 F.3d 1069,

dependent on the particular facts alleged, the particular legal theories asserted, and the particular state laws invoked. Any differences in outcome in applying properly stated Rule 23 principles to such varying factual circumstances would not justify certiorari. *See* Stern et al., *supra*, at 250 (where asserted conflict "arises from mere differences in the factual situations, certiorari will be denied").

In any event, it is clear that the Third, Fifth, Ninth and D.C. Circuits have not departed from the broad consensus, as petitioners submit. Petitioners' reliance on the Fifth Circuit's decision in *Castano* and the D.C. Circuit's decision in *Walsh* is especially inapt. Just like the ruling below, each of those decisions *reversed* the certification of a nationwide class, each on the ground that the district court had failed to determine that the applicable laws of every state were sufficiently uniform to satisfy the commonality and manageability requirements of Rule 23. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *see also Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313-15 (5th Cir. 2000) (reversing certification of nationwide class in no-personal-injury product defect case on ground of state-law variation); *Bates v. Ford Motor Co.*, 174 F.3d 198 (5th Cir. 1999) (affirming denial of nationwide product defect class involving Ford Bronco IIs premised upon the same alleged small-value claims and same alleged rollover defect asserted in this case on ground of state-law variation), *aff'g Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368-69 (E.D. La. 1997).

Petitioners ignore the outcomes in *Castano* and *Walsh* and read them only for the proposition that a court must con-

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1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Rhone-Poulenc*, 51 F.3d at 1300-02; *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987).

duct an analysis of whether variations in state law affect predominance and manageability. Pet. 14. But that rule would create no conflict here, where both courts below *did* conduct such an analysis, and both agreed with the respondents' extensive submission demonstrating that the petitioners' individual causes of action vary significantly in their material elements from state to state. *See supra* at 6-7, 9-10; Defs.' 7th Cir. Jt. App. 280-316 (attached as "App. B").[6] At bottom, petitioners' claim of conflict with decisions of the Fifth and D.C. Circuits reduces to nothing more than petitioners' belief that the courts below erred in assessing the variations in state law. Petitioners are wrong, but no matter: their predictable disagreement with the courts' view of the effects of state-law variations on the particular facts and theories alleged here presents no recurring question of federal law worthy of review.

Petitioners' claim that the decision below conflicts with decisions from the Ninth Circuit, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), and the Third Circuit, *In re Prudential Ins. Co.*, 148 F.3d 283 (3d Cir. 1998), is also meritless. Those cases each involved the certification of a *settlement* class, not a class in which claims actually would have been tried. Such cases are not comparable, as the Third and Seventh Circuits have agreed. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("Although plaintiffs attempt to fit this case under *Prudential*, that case raised different issues because the class was certified for the purpose of settlement."); *Mexico Money*, 267 F.3d at 746-47 (variations in state law may be less consequential to certification of settlement class, where

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[6] In fact, virtually every state court to address "economic-loss-only" product-defect theories like petitioners' has flatly rejected them. *See infra* note 8. Petitioners therefore could not even show – as they must – that every state would actually recognize their theory, much less that every state would treat it in substantially the same way.

"no one need draw fine lines among state-law theories of relief"). Indeed, just like the Seventh Circuit in this case and others, the Third and Ninth Circuits have issued decisions rejecting efforts to certify nationwide *litigation* classes on the same state-law variation grounds underlying the decision below. *See Zinser*, 253 F.3d at 1185-86, 1188-1193 (9th Cir.); *LifeUSA Holding Inc.*, 242 F.3d at 148 n.13 (3d Cir.) ("The individual adjudications of causation, reliance, LifeUSA's multiple defenses, and application of differing state laws would make trying the plaintiffs' claims in a class action a thoroughly unwieldy endeavor and in the terms of *Georgine* make it impossible to conclude that this class action is superior to alternative means of adjudication."). Nothing in the decision below conflicts with these decisions,[7] and nothing about the Seventh Circuit's unremarkable application of Rule 23's commonality and manageability requirements merits review.

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[7] The Third Circuit's older decision affirming a nationwide asbestos class in *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986), reflects only a fact-bound difference in outcome, inappropriate for the exercise of certiorari jurisdiction. *See supra* at 12. What is more, in that case the court was explicitly "influenced" in its Rule 23 analysis "by the highly unusual nature of asbestos litigation," *id.*, an approach explicitly rejected in *Amchem*, 521 U.S. at 628-29 (refusing to depart from Rule 23 requirements even if "nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure"); *see* Pet. App. 13a ("Tempting as it may be to alter doctrine in order to facilitate class treatment, judge must resist so that all parties' legal rights may be respected."). An asserted conflict with "a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of the Supreme Court or other courts of appeals, as well as of the same court, will not be an adequate basis for granting certiorari." Stern et al., *supra*, at 230.

II. THE COURT OF APPEALS' OBSERVATION THAT REGULATION BY NHTSA IS A SUPERIOR METHOD OF ADJUDICATING DISSIMILAR CLAIMS DID NOT "USURP STATES' LAWMAKING POWER."

Petitioners' second Question Presented attacks the court of appeals' observations that compensating plaintiffs whose products have not suffered any defect manifestation results in excess compensation and overdeterrence, Pet. App. 6a, and that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone," *id.* at 11a. Tying those two statements together, petitioners contend that the court of appeals violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by supposedly finding NHTSA administrative regulation superior to adjudication of a state-law theory that results in overdeterrence. Pet. 19-20, 23.

Petitioners either badly misunderstand or baldly misrepresent the opinion below. The court of appeals did not decide that NHTSA regulation is superior because states *should not* recognize petitioners' theory. Rather, the court's critique of that theory was part of its analysis of legal commonality and manageability, where the court simply explained why most states *do not* recognize petitioner's theory. Pet. App 6a-7a. This was no mere supposition by the court; it cited numerous state-law cases so holding, *id.* at 7a, and there are indeed many, many more.[8] If most states do not recognize

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[8] Petitioners' contrary claim that all states recognize "no manifestation of defect" product claims as part of their warranty law, Pet. 21, is false. Petitioners outright ignore the many courts that have rejected "no manifestation of defect" claims whether the claims were brought as tort-based or contract-based causes of action. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998) ("In most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is ac-

petitioners' theory, then petitioners necessarily have failed to carry their burden of establishing that their claims would be recognized and treated the same in every state. Moreover, the court went on to hold that even if there were jurisdictions that would recognize a legal injury for an alleged product defect that has not manifested itself, the warranty and fraud law vehicles that would be invoked to vindicate that injury "vary considerably" among the states, "and courts must respect these differences rather than apply one state's law to sales in other states with different rules." Pet. App. 7a.

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tionable."); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 12, 16-17 (App. Div. 2002) (dismissing, *inter alia*, breach of implied warranty and consumer protection act claims because "it would be manifestly unfair to require a manufacturer to become [] an indemnifier for a loss that may never occur"); *Green v. Gen. Motors Corp.*, No. L-4643-99, 2002 WL 1575589, at *1-*2 (N.J. Super. Ct. Jan. 4, 2002) (rejecting claims under, *inter alia*, breach of implied warranty and consumer protection act because the product in question has "never . . . failed to work properly"); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 559-64 (N.D. 2002) (same for fraud and negligence claims); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (same for breach of warranty, unjust enrichment, and fraud); *Yu v. IBM Corp.*, 732 N.E.2d 1173, 1177 (Ill. App. Ct. 2000) (same for breach of warranty and consumer protection act claim "[a]s plaintiff failed to allege that the Medic system actually malfunctioned and caused damages due to the Y2K defect"); *Nichols v. Gen. Motors Corp.*, No. 99-C-566, 1999 WL 33292839, at *3 (N.H. Super. Ct. Dec. 13, 1999) (same for, *inter alia*, breach of implied warranty and consumer protection act claims); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998) (dismissing tort and implied warranty claims because "[t]he absence of a manifested defect precludes a cognizable claim"); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 172, 174-75 (S.D. Miss. 1996) (rejecting claims that roofs on sport-utility vehicles were defective where plaintiffs experienced no defects in their vehicles); *Am. Suzuki Motor Corp. v. Superior Ct.*, 44 Cal. Rptr. 2d 526, 529 (Cal. Ct. App. 1995) ("[I]n the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation."); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. Ct. App. 1990) (same for failure to warn claims because plaintiff did not allege "failure or malfunction of the product").

If petitioners seriously believe the court based its view of NHTSA's superiority on a conclusion that applicable state laws are not wise enough for a federal court to follow in accordance with *Erie*, petitioners are seriously mistaken. What the court held, as part of its commonality and manageability analysis, is that state laws *must* be followed, and that such laws not only generally do *not* recognize petitioners' theory, but to the extent any do, such laws do not provide a basis for common, classwide adjudication of the theory. Yet again, closer scrutiny of petitioners' Question Presented reveals it to be nothing more than disagreement over a purely state-law issue: the court of appeals' entirely correct conclusion that most states do not recognize their theory. Petitioners' objection to this state-law conclusion does not raise any federal issue or implicate any circuit conflict. And petitioners simply ignore the court's distinct holding that the relevant state-law vehicles for adjudicating their theory would not permit sufficiently uniform treatment of all claims in the nationwide class in any event. The *Erie* issue petitioners raise is a figment of their imagination, not a basis for certiorari.

III. THE COURT OF APPEALS DID NOT RELY ON THE "SMALL VALUE" OF INDIVIDUAL CLAIMS TO DENY CERTIFICATION.

Petitioners next argue that by "us[ing] the small value of each individual class member's claim as a basis for denying certification," the court of appeals created a conflict with decisions of other circuits. Pet. 25. But the Seventh Circuit did not rely on the "small value" of individual claims to deny certification, and petitioners' conflict is again illusory.

Petitioners devote an entire Question Presented to the "small value" issue, but cite not one passage in the opinion that actually discusses the purportedly "small value" of the class members' individual claims. No such passage exists. Instead petitioners trot out the same combination of the court's "superiority" language and its observations about

overcompensation and overdeterrence that they rely upon for their second Question Presented. Pet. 25 (citing Pet. App. 6a-7a n.1 & 11a). Nowhere in either of these passages does the court of appeals make even a passing reference to the size of any of the petitioners' claims. The issue argued by petitioners is simply not presented by the opinion below.

In any event, there is no confusion in the lower courts about the significance of "small value" claims to the class certification decision. It is of course true, as petitioners emphasize, that Rule 23 is intended to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617. But that does not mean that *every* case involving small monetary claims can or should be tried as a class action. Small-value claimants, like any other claimants, must meet all of the requirements for class certification (*e.g.*, commonality, predominance and superiority) plainly set forth in Rule 23. Indeed, this Court has specifically rejected the idea that the "unambiguous requirement[s] of Rule 23" can be overlooked for the sake of permitting small value claims to be prosecuted as a class action, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974), and there is, not surprisingly, no circuit conflict on the point.

All of the circuits to which petitioners point for their "conflict" recognize that Rule 23 operates *both* to facilitate aggregation of small claims and *also*, through its requirements of commonality, predominance and superiority, to ensure that such aggregation occurs only when it would not deprive either plaintiffs or defendants of a fair opportunity to litigate individual claims or defenses. *See, e.g., In re Prudential*, 148 F.3d at 316 (certifying small-value claims only on finding of "sufficient unity so that absent members can fairly be bound") (quoting *Amchem*, 521 U.S. at 621); *Allison v. Citgo Petroleum*, 151 F.3d 402, 422 n.17 (5th Cir. 1998) (small-value claims may not be certified for settlement

where would result in "unfairness to all"); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005-06 (11th Cir. 1997) ("When there are no predominant issues of law or fact . . . class treatment would be . . . unjust, as the various factual and legal nuances of particular claims are lost in the press to clear the lone court's docket.").

The decision below is entirely consistent with this well-established understanding. The Seventh Circuit did not use the small size of the claims as a reason for denying certification despite Rule 23; if anything, it was the district court that used the small size of the claims as a reason for certification despite Rule 23. Beyond the Seventh Circuit's Indiana choice-of-law and factual commonality holdings, the court's discussion of the flaws in the certification order was devoted to explaining why Rule 23's important procedural protections could not be circumvented merely to facilitate nationwide class treatment of petitioners' claims. No circuit would tolerate the certification of a nationwide class that otherwise failed Rule 23's commonality and manageability requirements simply because of the size or nature of the individual claims; the Seventh Circuit's correction of such an error here merits approbation, not further review.

IV. THE COURT OF APPEALS' APPROACH TO EFFICIENCY IS CONSISTENT WITH RULE 23 AND THE DECISIONS OF OTHER CIRCUIT COURTS.

Petitioners' final Question Presented asks whether the court of appeals erred in "interpreting 'efficient adjudication' under Rule 23(b)(3) to require 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions.'" Pet. i. Once again, petitioners are arguing an issue that is not raised by this case. The Seventh Circuit did not, of course, hold that Rule 23 or its "efficiency" component "requires" decentralized trials. The court's discussion of efficiency merely reiterates the well-settled point that not every complex case is

handled "efficiently" by certifying a nationwide class, and that efficiency – on whatever model – cannot trump the plain requirements of Rule 23.

The court of appeals' treatment of efficiency comes in response to the district court's views on the subject. The district court had concluded that the only "efficient" disposition of these claims was by centralized trial in a single forum. The alternative of separate trials of individual claims, the district court believed, would be so inefficient that class certification was obviously superior: separate trials would "be immensely burdensome to the courts, parties, and witnesses," and would "create the risk of inconsistent verdicts." Pet. App. 66a. In the passage to which petitioners object, the court of appeals questioned the assumptions behind the district court's approach, observing that the "model of the central planner" will not always lead to more accurate and sensible resolutions than a decentralized process of multiple trials. *Id.* at 12a.

What is important here – and what petitioners neglect to mention – is that the Seventh Circuit expressly recognized that this issue is in any event resolved by the terms of Rule 23, as well as principles of federalism, which prohibit certification in the face of factual or legal variation regardless of purported "efficiencies." *Id.* ("No matter what one makes of the decentralized approach as an original matter, it is hard to adopt the central-planner model without violence not only to Rule 23 but also to principles of federalism."). The problem below, in other words, was that the *district court* had ignored fundamental Rule 23 principles in a myopic quest for "efficiency" in the litigation of petitioners' claims. As the court of appeals observed variously throughout its opinion:

> According to the district court, other obstacles (such as the fact that the six named tire models represent 67 designs for different sizes and performance criteria, and that half of all 1996 and 1997 model Explorers

> came with Goodyear tires) are worth overcoming in light of the efficiency of class treatment. Pet. App. 3a.
>
> [I]t is state law rather than a quest for efficiency in litigation (or in product design decisions) that controls. *Id.* at 5a.
>
> Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Id.* at 12a (citations omitted).

On top of those observations, the Seventh Circuit's discussion of the "market" model and "central planner" model of efficiency simply explains why the district court's emphasis on the supposed efficiency of centralization was misguided in theory, as well as misplaced in light of *Erie* and Rule 23. But the latter point is the only actual "conclusion about efficiency" (Pet. 27) adopted by the Seventh Circuit: the district court was not free to bend the state choice-of-law rules dictated by *Erie* or to disregard Rule 23's commonality requirements in the name of a purported "efficiency" goal.

That holding is obviously correct and entirely uncontroversial. The Court has made clear that a "one case, one court, one set of rules" approach, Pet. App. 11a, is precluded by *Erie* and Rule 23 where the applicable state choice-of-law rules do not support the streamlining of the litigation and where the circumstances and claims of individual plaintiffs differ from state to state and transaction to transaction. *See, e.g.*, *Amchem*, 521 U.S. at 620, 622-23 ("[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) ("constitutional limitations on choice of law" in the

class action context are "not altered by the fact that it may be more difficult or more burdensome to comply with th[ose] limitations" notwithstanding any "practical reasons" supporting a different approach). Nor is there any conflict on this point in the lower courts. To the contrary, both the circuits identified by petitioner, Pet. 29, adhere to the same principle adopted by the court below: district court discretion to advance policy goals through class certification is limited by the commonality requirements of Rule 23. *See, e.g., Zinser*, 253 F.3d at 1186 (9th Cir.) ("While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23."); *In re Am. Med. Sys.*, 75 F.3d at 1079 (6th Cir.) (same). Other circuits agree. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998) ("[A] class action may be the most economical and efficient means of litigation in many circumstances" but not where the "disparate nature of the claims precludes class treatment"); *Castano*, 84 F.3d at 752 (5th Cir.) (reversing class certification for lack of superiority because district court "ignor[ed] variations in state law and how a trial on the alleged causes of action would be tried").[9]

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[9] Midway though their final argument, petitioners recast it as one involving a conflict between Seventh Circuit panel decisions. Pet. 29-30 (arguing that decision below departs from the prior "teaching" of *Rhone-Poulenc*). Confusion within a single circuit, of course, is not grounds for granting certiorari. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, there is no such intra-circuit conflict, as reflected by the fact that not one Seventh Circuit judge voted to hear this case en banc when petitioners so moved. Pet. App. 77a. The panel below merely reiterated *Rhone-Poulenc*'s discussion of the benefits of decentralized litigation of mass tort actions involving plaintiffs with claims arising under different factual circumstances and different laws. Pet. App. 12a. Other aspects of *Rhone-Poulenc* also lend direct support to the panel's holding in this case. *Rhone-Poulenc*, 51 F.3d at 1302 (reversing certification of nationwide class because district court applied an "amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions" in violation of its *Erie* responsibility).

Petitioners seem to suggest, once again, that application of this well-established rule to small-value claims raises special problems for the lower courts. Pet. 29. But as discussed above, the circuit courts agree that small-value claimants are not exempt from the requirements of Rule 23. Any efficiencies that come from trying small claims together cannot be purchased at the price of Rule 23's procedural protections. *See supra* Part III; *see also LifeUSA Holding Inc.*, 242 F.3d at 148 n.13 (3d Cir.) ("Although plaintiffs' claims are relatively modest and separate suits may be impracticable, that factor by itself is insufficient to overcome the hurdles of predominance and superiority and efficient and fair management of a trial, which Rule 23(b) requires.").[10] The court of appeals well understood that important principle. That petitioners do not, or that they wish it were otherwise, is no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[10] As a matter of fact, petitioners are in no position to assert that the Seventh Circuit's approach to efficiency undermines their incentive to pursue their so-called "small value" claims, Pet. 29 – claims for several thousand dollars apiece, not including the attorneys' fees and punitive damages sought. Eleven of the plaintiffs petitioning this Court are currently pursuing the trial of their claims. Petitioners promised the Seventh Circuit that they would pursue their claims on an individualized basis if class certification was reversed, and they are making good on that promise. Even if there were some open question regarding the treatment of small-value claims under Rule 23 (which there is not), petitioners' own conduct reveals this case to be an exceptionally poor vehicle for addressing it.

Respectfully submitted,

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Dated December 6, 2002

APPENDIX A

United States District Court, Southern District of Indiana, Indianapolis Division

In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation

No. IP-00-9373-C-B/S

July 27, 2001

ORDER GRANTING IN PART AND DENYING IN PART THE MOTION TO DISMISS THE MASTER COMPLAINT

Sarah Evans Barker, District Judge.

This cause is before the Court on the Motion to Dismiss the Master Complaint in this Multi-District Litigation ("MDL"), filed by defendants Bridgestone/Firestone, Inc., ("Firestone") and Ford Motor Company ("Ford"). The motion is fully briefed, and the Court, being duly advised, **GRANTS IN PART AND DENIES IN PART** the motion for the reasons set forth below.[1]

BACKGROUND

The Master Complaint, which was filed in this Court on January 2, 2001, combines dozens of class action complaints involving Firestone tires that were filed in or removed to federal district courts throughout the country and transferred to this MDL proceeding. The named Plaintiffs in the Master Complaint are residents of 27 different states[2] who seek to

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[1] The Court has addressed the issue of federal preemption under the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, raised in the motion to dismiss Plaintiffs' Eighth Claim for Relief in a separate Order issued simultaneously with this ruling.

[2] The named Plaintiffs reside in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York,

represent a class ("the Tire Class") essentially consisting of "all persons and entities in the United States who now own or lease, or owned or leased, vehicles that are or were equipped with Firestone-brand ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, Wilderness, or other comparably designed or manufactured Firestone-brand, steel-belted radial tires" ("the Tires") and a separate class ("the Explorer Diminution Class")[3] essentially consisting of "all persons and entities in the United States who now own or lease, or owned or leased, Ford Explorer sport-utility vehicles, regardless of the tires with which those Explorers were equipped."[4] Defendant Firestone is an Ohio corporation with its principal place of business in Nashville, Tennessee. Defendant Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan.[5]

The specific claims asserted in the Master Complaint are set out in detail below, but in general Plaintiffs allege that the Tires are defective due to their design and/or method of manufacture. The defect causes the Tires to have "an unreasonably dangerous propensity to suffer complete or substantial tread separation or 'belt leaves belt' separation." Master Complaint, P 4. In addition, Plaintiffs allege that certain models of the Ford Explorer have "significant handling and

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North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia.

[3] The Court has not yet ruled on Plaintiffs' Motion for Class Certification. We use these terms throughout this Order simply to describe the allegations of the Master Complaint.

[4] The Master Complaint proposes various subclasses. Except where specifically noted, the subclasses are not relevant to the resolution of this motion to dismiss.

[5] Defendant Bridgestone Corporation ("Bridgestone"), the Japanese parent company of Firestone with its principal place of business in Tokyo, Japan, disputes this Court's jurisdiction over it and has not joined in the instant motion to dismiss.

stability defects" which created "a substantial risk of rollovers and other safety problems." *Id.*, PP 63-66, 70. In order to compensate for these stability defects, Plaintiffs allege that Ford and Firestone agreed to lower the recommended tire pressure on the Firestone tires that were used as original equipment on the Explorer. This had the effect of lowering the likelihood of rollover accidents, but also had the effect of exacerbating the tire defect and "substantially increasing the risk of tread separation and other catastrophic tire failures." *Id.* at PP 70-71.

The Master Complaint asserts federal claims pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and pendent state law claims for unjust enrichment, breach of express warranty, breach of implied warranty, negligence, violation of consumer protection statutes, and redhibition (under Louisiana statute). The Master Complaint specifically excludes any claims for personal injury or wrongful death resulting from accidents caused by the alleged defects; rather, it seeks remedies for those Tire and Explorer owners who have not been involved in accidents, but allegedly have suffered injury simply because they own(ed) or lease(d) defective vehicles or vehicles with defective tires.

ANALYSIS OF DEFENDANTS' MOTION TO DISMISS

I. Choice of Law

Defendants have moved to dismiss the Master Complaint on a variety of grounds. Before addressing any of the arguments raised by Defendants, we must first determine the appropriate law to apply to each of Plaintiffs' claims. For the federal claims asserted in the Master Complaint, the answer is relatively straightforward: for any questions of federal law about which federal circuits disagree, this Court, as the transferee court, applies the law of the federal circuit in which it

sits, in this case the Seventh Circuit. *In re Korean Air Lines Disaster of September 1*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The law of a transferor forum on a federal question . . . merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit."), judgment aff'd by *Chan v. Korean Air Lines*, Ltd., 490 U.S. 122 (1989); *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993) ("We agree with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim . . . .").

The choice of law issue for the state law claims in the Master Complaint is more complex, however. The threshold question is whether the relevant substantive laws of the different states involved are sufficiently different to require a choice of law analysis. *See Jean v. Dugan*, 20 F.3d 255, 260 (7th Cir. 1994) (citation omitted) ("This court has held that before 'entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states."). We conclude that Defendants have demonstrated such differences in the relevant states' laws.

We move to the next question, that is, which state's choice of law analysis should be used. Guidance is provided by the Seventh Circuit's holding that the choice of law rules of the forum state must be applied to determine the appropriate law to be applied to state law claims, whether they are premised on diversity of citizenship or are pendent to federal claims. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 681 (7th Cir. 1986). In MDL proceedings, the forum state generally is the state in which the transferor court of each individual action sits; in other words, the transferee court must make an independent choice of law determination for each state from which a case was transferred into the MDL proceeding. *See In re Air Crash*

Disaster Near Chicago, Ill., on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964)); *In re Air Crash Disaster at Boston, Mass., on July 31, 1973*, 399 F. Supp. 1106 (D. Mass. 1975)). However, the parties agree that this Court should be treated as the forum court because Plaintiffs filed their Master Complaint in this Court. Indiana's choice of law rules therefore are applicable.

A. Law Applicable to Plaintiffs' Tort Claims

The Master Complaint asserts a common law negligence claim, as well as a claim for violation of state consumer protection statutes, the latter of which we view to be most closely analogous to a common law tort claim for fraudulent misrepresentation and therefore subject to the choice of law analysis for tort claims.[6] Indiana follows a modified form of

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[6] Courts consistently examine the specific claims made in a particular case to determine whether a claim under a consumer protection statute should be treated as a tort or a contract action for choice of law purposes. *See, e.g., Hiller v. Manufacturers Product Research Group of North America, Inc.*, 59 F.3d 1514, 1537 (5th Cir. 1995) (plaintiffs' claim under Texas Deceptive Trade Practices Act sounded in tort); *Crellin Technologies, Inc. v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994) (plaintiff's claim under Massachusetts's unfair trade practices law treated as tort claim for choice of law purposes because it resembled tort of fraudulent misrepresentation); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 213 (E.D. Pa. 2000) (noting that claims under consumer fraud statutes may be based either in tort or contract law, and finding that "tort law is more appropriately applied considering the facts of this case" and therefore conducting a tort choice of law analysis to determine which state's statute should be applied); *Griffin v. Security Pacific Auto. Finan. Servs. Corp.*, 25 F. Supp. 2d 1214, 1216 (D. Kan. 1998) (applying, without comment, Kansas tort choice of law analysis to determine which state's consumer protection statute applied); *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 89 (D. Mass. 1996) (finding that plaintiff's claim under Massachusetts consumer protection statute was "no more than a dressed-up breach of contract or breach of warranty claim" rather than a "separate, tort-based theory of fraud").

the traditional *lex loci delicti commissi* rule in analyzing the choice of law question in tort cases. *Hubbard Mfg. Co., Inc. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Under the traditional rule, the substantive law of the "place of the tort" is applied--that is, the state in which the last event necessary to make the defendant liable for the alleged wrong took place, typically the state in which the injury occurred. *Id.* at 1073. Under the modified rule established by the Indiana Supreme Court in *Greeson*, this rule applies unless the place of the tort "bears little connection to the legal action." In those cases, other factors are considered, such as:

> 1) the place where the conduct causing the injury occurred;
>
> 2) the residence or place of business of the parties; and
>
> 3) the place where the relationship between the parties is centered.

Id. at 1073-74 (citing *Restatement (Second) of Conflicts of Laws* § 145(2) (1971)). "These factors should be evaluated according to their relative importance to the particular issues being litigated." *Id.* at 1074.

Following the dictates of *Greeson*, we begin our choice of law analysis for the tort claims in the Master Complaint by determining the place of the tort for each named Plaintiff. As noted above, the place of the tort typically is the state in which the injury to the plaintiff occurred. In this case, Defendants argue, and Plaintiffs do not dispute, that any injury suffered by Plaintiffs occurred in each Plaintiff's home state, or perhaps more precisely in the state in which each Plaintiff purchased an Explorer or one or more of the Tires.

Whether these states "bear little connection" to this litigation turns on the nature of the tort claims in this action. The essence of Plaintiffs' tort claims is that Defendants were negligent in "designing, manufacturing, advertising, and sell-

ing" vehicles and tires that were unreasonably dangerous. Master Complaint, P 327. This negligence allegedly caused Plaintiffs to suffer actual damages and has threatened them with "irreparable harm by undue risk of physical injuries or death." *Id.* at P 329. Plaintiffs also allege that Defendants violated "any and all state consumer protection statutes"[7] in a number of ways, including by representing "through their advertising, warranties, and other express representations, that the [Firestone tires] and Explorers had benefits or characteristics that they did not actually have." *Id.* at P 308. Plaintiffs therefore seek compensatory and punitive damages as well as equitable relief.

The basic factual allegations[8] in the Master Complaint relating to Plaintiffs' tort claims are as follow:

> 1. The Firestone tires at issue are defective due to their design and/or method of manufacture. The defect causes the tires to have "an unreasonably dangerous propensity to suffer complete or substantial tread separation or 'belt leaves belt' separation." Master Complaint, P 4.
>
> 2. Ford designed, marketed and sold the Explorer with "significant handling and stability defects" which created "a substantial risk of rollovers and other safety problems." *Id.* at PP 63-66, 70.

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[7] The Master Complaint's Tenth Claim for Relief is entitled "Violation of all States' Consumer Protection Statutes." The complaint does not specifically cite any state's statute. In their brief in response to the motion to dismiss, Plaintiffs argue that the Tennessee Consumer Protection Act applies to their claims against Firestone and the Michigan Consumer Protection Act applies to their claims against Ford.

[8] This summary of Plaintiffs' allegations is in no way intended to be exhaustive.

3. Ford's engineers recommended certain design modifications that would correct these defects, but Ford did not implement those changes because they would have caused a delay in production of the Explorer. *Id.* at P 70.

4. Instead of implementing the modifications recommended by their engineers, Ford, with Bridgestone and Firestone's agreement, utilized a "quick fix" to the Explorer's rollover problem: it lowered the tire pressure on the Firestone tires used as original equipment on the Explorer. This had the effect of lowering the likelihood of rollover accidents, but also had the effect of exacerbating the tire defect and "substantially increasing the risk of tread separation and other catastrophic tire failures." *Id.* at PP 70-71.

5. Defendants failed to conduct safety tests on the Explorer with the lowered tire pressure. *Id.* at P 78.

6. Defendants knew that the Explorer's weight capacity of 750 to 1310 pounds, depending on the model, was likely to be exceeded with normal use of the vehicle, thereby further increasing the risk of tire failure. *Id.* at P 77.

7. Defendants knew of the defects in the Firestone tires and the Explorer and the fact that they had caused numerous accidents resulting in serious injuries and death, especially in hot weather climates, but chose to "cover up" those defects for several years before finally announcing a limited recall in August 2000. *Id.* at PP 79-93.

8. The August 2000 recall was inadequate because it did not include all models of Firestone

tires with the tread separation defect. *Id.* at P 105.

9. Ford has increased its recommended tire pressure for Explorers, forcing Explorer owners into "a potentially deadly catch-22" of choosing between the higher tire pressure, which leads to a higher rollover risk, or the lower tire pressure, which leads to a higher tread separation risk. *Id.* at PP 120-21.

10. Defendants made fraudulent misrepresentations in their national advertising campaigns regarding the "features, safety, quality, and value" of the Firestone tires and Explorers which induced the Plaintiffs to purchase or lease them. *Id.* at P 122.

An examination of these allegations indicates that the place where each allegedly defective tire and/or Explorer was purchased or used is insignificant to Plaintiffs' claims. All of the alleged tortious conduct took place at each Defendant's principal place of business--Michigan for Ford, Tennessee for Firestone. Ford and Firestone sell their products in every state in the nation. The place where each Plaintiff purchased his or her vehicle or tire is entirely irrelevant to Plaintiffs' tort claims, as evidenced by the fact that, under Plaintiffs' theory, each Plaintiff would have suffered the identical injury wherever he or she purchased or used the defective tire or vehicle. Thus, we conclude that any place where the tort manifested itself other than the point of manufacturing and marketing has little connection to the tort claims in the Master Complaint.

This result is consistent with Indiana cases and federal cases applying Indiana law. For example, in *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. Ct. App. 1997), a class of nearly 600 Indiana farmers sued the accounting firm of KPMG Peat Marwick ("Peat Marwick") for negligently

auditing the financial statements of Merchants Grain, Inc. ("MGI"), a company that operated grain elevators in Indiana and other states. MGI filed bankruptcy after failing to pay for the grain the farmers deposited in MGI's elevators. The farmers alleged that Peat Marwick's negligent audit of MGI permitted MGI to renew its federal license to operate grain elevators, and that "had the financial statements fairly portrayed the financial condition of MGI in all material respects, MGI would not have been eligible for USDA licensing." *Id.* at 1285. The court applied the Indiana choice of law rule for tort claims as set forth in *Greeson*. The parties agreed that the place of the tort was Indiana, and the defendant argued that Indiana had a significant connection to the lawsuit because the plaintiffs were farmers who resided in Indiana and deposited their grain in elevators located in Indiana in "alleged reliance upon the existence of a USDA license posted on the wall" in Indiana. The court, however, disagreed, noting that:

> Designated evidence indicated the audit was prepared by Peat Marwick in Missouri, for a client whose principal place of business was Missouri, for submission to a Missouri office of USDA, which office then relicensed MGI. The presence of these facts in an action for accountant negligence render insignificant, in a choice-or-law [sic.] analysis, the Indiana nature of the farmers' contacts.

Id. at 1287. In other words, because all of the defendant's conduct relevant to the plaintiffs' tort claims took place in Missouri, and the plaintiffs would have suffered the same injury whether they had deposited their grain in Indiana or in an MGI elevator located in another state, the court determined that Indiana's connection to the lawsuit was insignificant. *See also Castelli v. Steele*, 700 F. Supp. 449 (S.D. Ind. 1988) (finding that the place of the tort, Illinois, bore little

connection to a medical malpractice action filed by an Illinois resident who received alleged negligent medical care while in Indiana and negligent advice in Illinois over the phone from the same Indiana doctor).[9]

Because in this case any place other than where the Tires and the Explorers were manufactured bears no significant connection to the Plaintiffs' tort claims, *Greeson* instructs that we must consider other factors to determine the appropriate law to apply, such as: the place where the conduct

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[9] Contrast the cases cited above with the following cases in which courts have held that the place of the tort did bear a significant connection to the lawsuit: *Cox v. Nichols*, 690 N.E.2d 750 (Ind. Ct. App. 1998) (place where automobile collision occurred bore significant connection to lawsuit arising out of the collision); *Tompkins v. Isbell*, 543 N.E.2d 680, 682 (Ind. Ct. App. 1989) (same, because "the parties' conduct in operating their motor vehicles prior to the collision will be the focus of attention to determine liability"); *Bencor Corp. v. Harris*, 534 N.E.2d 271, 273 (Ind. Ct. App. 1989) (Plaintiff, a Tennessee resident, was injured while working on a construction job in Indiana for his Tennessee employer; court held that because "the performance of the construction contract, the direction of the workman, the instrumentality that caused injury, the alleged negligence, and the injury all occurred in Indiana" and "Indiana safety and building codes" were also at issue, Indiana had a significant connection to the tort claim.); *Judge v. Pilot Oil Corp.*, 205 F.3d 335, 337 (7th Cir. 2000) (in wrongful death action involving shooting in Indiana, the place of shooting--"the last (and only) event making the defendants liable"--was significant, in that "the parties' conduct in Indiana that resulted in David's death will be the key element to determine if the defendants should be held accountable for David's death"); *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 805 (7th Cir. 1997) (the place of the tort, Saudi Arabia, had a significant connection to Saudi citizen's claim against Indiana corporation for various torts arising out of agreement that plaintiff would promote, market and sell defendant's products in Saudi Arabia; Saudi Arabia was residence of plaintiff and one of the defendants and was "the locale where the parties conducted their ongoing business relationship"); *but see In re Estate of Bruck*, 632 N.E.2d 745, 747-48 (Ind. Ct. App. 1994) (Ohio, where automobile accident killed two Indiana residents, had an insignificant connection to the lawsuit because the deceased "had no connection with Ohio other than to make use of the Ohio Turnpike in travelling from New York to Indiana.").

causing the injury occurred, the residence or place of business of the parties, and the place where the relationship between the parties is centered. These and any other relevant factors are to be evaluated "according to their relative importance to the particular issues being litigated." *Greeson*, 515 N.E.2d at 1074.

Applying the *Greeson* factors to this case, we note that the named Plaintiffs reside in 27 different states, and the proposed classes include residents of all 50 states and the District of Columbia. However, as discussed in detail above, we find no basis on which to conclude that the residences of Plaintiffs are important to this litigation. Neither is the fact that Firestone, by virtue of its place of incorporation, is an Ohio corporation or that Ford is a Delaware corporation. Further, the relationship between the parties is simply that of buyer and seller; while Plaintiffs allegedly were injured because they bought Defendants' products, the place where they were purchased is not significant to a Plaintiff's tort claims. What is significant, and what will be the focus of this litigation, is the conduct of Defendants as manufacturers. As set forth above, Plaintiffs assert, and Defendants do not dispute, that virtually all of the alleged tortious conduct by the Defendants took place at each Defendant's principal place of business--Michigan for Ford and Tennessee for Firestone. In short, that is where the allegedly defective tires and Explorers were designed; that is where Ford allegedly made the decision not to institute the design changes recommended by its engineers, but rather to lower the recommended tire pressure for the Explorer; that is where decisions regarding advertising were made; and that is where all decisions regarding the scope of the recall were made. Just as the court in *Asher* determined that Missouri law should apply because Missouri was "the place where virtually all of the acts of the alleged negligent audit occurred," 689 N.E.2d at 1287, and the court in *Castelli* determined that Indiana law should apply because all of the defendant-doctors' alleged negligent actions

occurred in Indiana, 700 F. Supp. at 454-44, this court determines that, for purposes of Plaintiffs' tort claims, the law of Michigan should apply to Ford and the law of Tennessee should apply to Firestone. Further, Plaintiffs' claims for violation of state consumer protection statutes will be treated as a claim for violation of the Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws § 445.901 *et seq.*, against Ford, and a claim for violation of the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-104 *et seq.*, against Firestone. To the extent that the Master Complaint purports to assert claims under any other states' consumer protection statutes, those claims are hereby **DISMISSED**.[10]

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[10] Defendants, relying upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), argue in passing that this result would be unconstitutional. In *Shutts*, the Supreme Court reasserted its earlier holding in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), that "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 312-13). It then applied that holding to the case before it, in which a Kansas court had applied Kansas law to a nationwide class action suit brought by gas company investors seeking to recover interest on royalties. The Court, noting that the defendant was not a resident of Kansas and that over 99% of the gas leases involved in the suit and some 97% of the plaintiffs had no connection at all to Kansas, found the blanket application of Kansas law to all of the plaintiffs' claims unconstitutional. This case clearly is factually distinguishable from *Shutts*. In our case, all of Plaintiffs' claims are connected to Michigan and/or Tennessee, because, as discussed above, virtually all of Defendants' actions relevant to Plaintiffs' claims took place in those states. In contrast, the vast majority of the plaintiffs' claims in *Shutts* had nothing at all to do with Kansas; they involved leases in other states held by plaintiffs who resided in other states, and nothing relevant to those plaintiffs' cases occurred in Kansas. Accordingly, *Shutts* does not dictate a finding that it would be constitutionally impermissible to apply only Tennessee and Michigan law to all of Plaintiffs' claims in this case.

B. Law Applicable to Plaintiffs' Contract Claims

In addition to their tort claims, Plaintiffs assert claims for breach of express warranty and breach of implied warranty. These claims, which are premised on sections of the Uniform Commercial Code, sound in contract, and therefore Indiana's choice of law rules for contract claims apply. *See Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562, 577 (Ind. Ct. App. 1986) (holding that warranty actions based on the Uniform Commercial Code sound in contract). In addition, Plaintiffs assert a claim for unjust enrichment, which is a quasi-contractual claim, and is therefore also analyzed under the choice of law rules for contracts. *See Community Care Centers, Inc. v. Sullivan*, 701 N.E.2d 1234, 1239 (Ind. Ct. App.

Defendants also argue that the home states of Plaintiffs have a greater interest in having their law applied to protect their residents than do the home states of Defendants. This may or may not be the case. Numerous states do apply a "governmental interests" test for choice of law, or at least treat as an important factor each state's relative interests in having its law applied to a particular cause of action. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 15 P.3d 1071, 1077 (Cal. 2001) (Under California law, when an action involves claims of non-California residents, "the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law."); *Fu v. Fu*, 733 A.2d 1133, 1142 (N.J. 1999) (noting that the competing interests of the relevant states is "the most significant factor in the tort field" in New Jersey choice of law analysis); *District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) ("In determining which jurisdiction's law to apply in a tort case, we use the 'governmental interests' analysis, under which we evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be more advanced by the application of its law to the facts of the case under review."); *American Family Mut. Ins. Co. v. Farmers Ins. Exch.*, 504 N.W.2d 307, 309 (N.D. 1993) ("The law of the jurisdiction whose 'interests are more deeply affected by the issues raised' should govern.") (citation omitted); *Barringer v. Idaho*, 727 P.2d 1222, 1226 (Idaho 1986) ("The conflict between the states' laws should be resolved rationally based upon the interests and policies of each state."). However, this factor is not determinative, or indeed generally even considered, by Indiana courts in making choice of law decisions in either tort or contract cases.

1998) (describing claim for unjust enrichment as quasi-contractual in nature), trans. denied (1999); *Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 741 (6th Cir. 1999) (citation omitted) (noting that "Michigan's choice of law rules governing contract actions have also been applied to the quasi-contractual claim of unjust enrichment").

To determine the applicable law in a contract claim, Indiana courts "'will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact.'" *Greeson*, 515 N.E.2d at 1073 (citation omitted). For all of the reasons noted in the previous discussion of Plaintiffs' tort claims, we conclude that Tennessee and Michigan have the most intimate contact with the facts relevant to Plaintiffs' breach of warranty claims against Firestone and Ford, respectively. While Defendants note that "Plaintiffs presumably negotiated and acquired their tires and/or vehicles, primarily used their equipment, and negotiated and received any repair or replacement in their home states," Reply Brief I[11] at 9, these are not the most significant acts relevant to Plaintiffs' breach of warranty claims. In reality, there was no negotiation between the parties regarding either the warranties or the tire replacement under the recall. Indeed, under Plaintiffs' theories, it is entirely irrelevant where each Plaintiff purchased Defendants' products, used Defendants' products most regularly, or resided at the time of purchase or when the Master Complaint was filed. Therefore, it cannot be said that any of those states has the most intimate contacts with the facts of this case. Instead, the facts in dispute all center in Tennessee and Michigan, where Defendants made and executed their decisions regarding both the formation of and alleged breach of any applicable warranties. Therefore,

[11] Defendants filed their initial brief and reply brief in three parts, labeled I, II, and III.

we shall apply Tennessee law to Plaintiffs' contract-based claims against Firestone, and Michigan law to Plaintiffs' contract-based claims against Ford.

C. Choice of Law Analysis Applied to Plaintiffs' Redhibition Claims

In addition to the claims discussed above, the Fourteenth Claim for Relief in the Master Complaint is a claim for breach of the warranty against redhibitory defects under Louisiana law.[12] Redhibition is the voidance of a sale of a consumer product on the ground that the product has a defect rendering it either useless or so imperfect that the buyer would not have originally purchased it. *Black's Law Dictionary* (7th Ed. 1999). Louisiana courts generally treat such claims as contractual in nature. *See Scruggs v. Minton Equip. Co., Inc.*, 722 So. 2d 130, 132 (La. App. 1998) (stating that it is "well settled" that "redhibition is based primarily in contract"); *but see Datamatic, Inc. v. International Business Machs. Corp.*, 613 F. Supp. 715, 718 (W.D. La. 1985) (citing *Lartigue v. R.J. Reynolds Tobacco*, 317 F.2d 19 (5th cir. 1963)) ("Redhibition cases have been aligned with tort actions in conflicts analysis."). Whether viewed as a contract or tort action, however, as noted above, Michigan and Tennessee law, not Louisiana law, apply to Plaintiffs' claims. Plaintiffs do not allege that a redhibition claim is viable under either Tennessee or Michigan law; therefore, Plaintiffs may not maintain an action for breach of warranty against redhibitory defects in this action, and Plaintiffs' fourteenth claim for relief is hereby **DISMISSED**.

II. Standard Applicable to Motion to Dismiss

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[12] This claim is asserted on behalf of a "Redhibition Subclass" consisting of "persons and entities domiciled or residing in the State of Louisiana who bought or leased vehicles in Louisiana that are or were equipped with [the Tires]." Master Complaint, P 137(f).

Defendants move to dismiss various claims in the Master Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that each fails to state a claim upon which relief may be granted.[13] This motion may be granted as to any given claim only if it is clear that Plaintiffs could not prove any set of facts consistent with the allegations in the Master Complaint that would support their claim for relief. *See Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000), cert. denied, 531 U.S. 880. In ruling on the motion to dismiss, the Court must accept as true all facts asserted in the Master Complaint and draw all reasonable inferences from them in Plaintiffs' favor. *Id.* The Court must also consider facts alleged in Plaintiffs' brief in opposition to the motion to dismiss, [14]as long as they are consistent with the Master Complaint. *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439-40 (7th Cir. 1994).

III. Sufficiency of Plaintiffs' Allegations of Injury

Defendants contend that the state law claims of all but three of the named Plaintiffs should be dismissed because Plaintiffs have failed to allege that they have suffered any legally cognizable injury as a result of Defendants' actions.[15]

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[13] Defendants several times make the rather obvious point that only those Plaintiffs who own(ed) or lease(d) a Ford Explorer, regardless of the type of tires that it had (or, we note, another Ford vehicle that came with the Tires as original equipment) can possibly have any type of claim against Ford, and only Plaintiffs who own(ed) or lease(d) vehicles with Firestone tires--either as original equipment or aftermarket--can possibly have any type of claim against Firestone. We do not read the Master Complaint in any way to assert the contrary.

[14] Class Plaintiffs' Opposition to Defendants Firestone and Ford's Motion to Dismiss ("Plaintiffs' Opposition").

[15] Three of the named Plaintiffs--Gary Gustafson, William Wehking, and Allan Simpson--allege that they have experienced a tread separation incident with their Firestone tires. Defendants concede that these three Plaintiffs have asserted a legally cognizable injury, but argue that their

Simply put, Defendants argue that the law provides no remedy for a defective product unless or until the defect manifests itself in some way and causes injury to person or property, and in this case Plaintiffs have alleged only that there is a risk that the alleged defects *may* cause a tread separation and/or rollover accident in the future. The Tire Class Plaintiffs counter that the injury to their tires has, in fact, manifested itself because, as a result of the defect in the Tires, "as soon as *any* driving is done, the tire starts to deteriorate abnormally, developing fatigue cracks that, while imperceptible at first, grow and spread" and will eventually lead to tread separation. Plaintiffs' Opposition at 54 (emphasis in original). The Explorer Diminution Class alleges that it has suffered injury in the form of the diminished resale value of their Explorers. Because the nature of injury required to maintain a cause of action differs depending upon the legal theory asserted, we will examine each cause of action in the Master Complaint to determine whether the injury pled by Plaintiffs is sufficient.

A. Negligence

In their Thirteenth Claim for Relief, entitled "Negligence," Plaintiffs assert the following:

> 326. [Defendants] had a duty to Plaintiffs and the Classes to exercise reasonable and ordinary care in the formulation, testing, design, manufacture, and marketing of the Tires and Explorers.
>
> 327. [Defendants] breached their duty to Plaintiffs and the Classes by designing, manufacturing, advertising and selling the Plaintiffs and the Classes Tires that have an unreasonably dangerous propensity to experience a sudden and substantial

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claims are without merit for other reasons; those arguments are addressed separately below.

> tread separation, and Explorers that have an unreasonably dangerous propensity to roll over, and by failing to promptly recall the Tires and Explorers or take other appropriate remedial action.
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> 328. [Defendants] should have known that the tires and Explorers were unreasonably dangerous and not as warranted and represented by [Defendants].
>
> 329. As a direct and proximate cause of [Defendants'] negligence, Plaintiffs and the Classes have suffered actual damages, and members of the Classes are threatened with irreparable harm by undue risk of physical injuries or death.

This is a classic product liability tort claim: Plaintiffs allege that Defendants designed and sold unreasonably dangerous (that is, defective) products that have caused them injury. However, the injuries alleged by Plaintiffs are not the typical tort damages of injury to person or property resulting from malfunction of a defective product. Indeed, the Tire Class Plaintiffs' tires have not malfunctioned (or, as Plaintiffs would say, have not, malfunctioned *yet*); neither have the Explorer Diminution Class Plaintiffs' vehicles malfunctioned. Rather, Plaintiffs allege that they have been injured by their propensity to malfunction. The issue, then, is whether, under Michigan or Tennessee law, this is a sufficient assertion of injury to sustain a product liability tort claim. Our view is that it is not.

The sale of a defective product, in and of itself, is not an actionable tort. An essential element of a product liability tort claim is an injury to the plaintiff's person or property:

> An actionable tort, whether based on negligence or strict liability, consists of two elements: a failure to act in accordance with the standard of care required by law and a resultant injury. While the

> sale of a defective product creates a potential for liability, the law grants no cause of action for inchoate wrongs. However egregious the legal fault, there is no cause of action for negligence or products liability until there is "actual loss or damage resulting to the interests of another."

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985) (citing *Prosser and Keeton on Torts*, § 30 at 165 (5th ed. 1984)); *see also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) ("There is generally no cause of action in tort until a plaintiff has suffered identifiable, compensable injury."). As Prosser and Keeton explain, "the threat of future harm, not yet realized, is not enough. Negligent conduct is itself not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered." W. Page Keeton et al., *Prosser and Keeton on Torts* 165 (5th ed. 1984). Although Plaintiffs assert that the Tires have developed fatigue cracks, they do not allege that those cracks have in any way affected the current performance of the Tires. Rather, what the Tire Class Plaintiffs really seek to recover for in this action is the possibility, or increased probability as compared to a non-defective tire, that the Tires will suffer a tread separation in the future because of the defect. Similarly, those Plaintiffs who own(ed) or lease(d) Explorers (including the Explorer subclass in the Tire Class and the Explorer Diminution Class Plaintiffs) seek to recover for the possibility that their Explorers will roll over, or for the lower resale price they might get because of that possibility. These simply are not cognizable tort injuries.

Analogous cases from throughout the country support this holding. For example, in *Weaver v. Chrysler Corp.*, 172 F.R.D. 96 (S.D.N.Y. 1997), the plaintiff alleged that integrated safety seats in certain Chrysler vehicles were defec-

tive because they improperly unlatched and separated. The court found the fact that the plaintiff did not allege that the child seat in his vehicle had ever malfunctioned to be fatal to the plaintiff's tort claims. *Id.* at 100 ("Where, as here, a product performs satisfactorily and never exhibits the alleged defect, no cause of action lies."). Similarly, in *In re Air Bag Prods. Liab. Lit.*, 7 F. Supp. 2d 792 (E.D. La. 1998), the plaintiffs alleged that the air bags in their automobiles were defective because they could seriously injure or kill front seat passengers when they deployed. The court determined that the plaintiffs had failed to state a tort claim because they themselves had not been injured by the air bags; in other words, they had not suffered any manifest injury as a result of the defect. *Id.* at 806 ("Thus, plaintiffs' failure to demonstrate or, even allege, manifest injury or defect shatters an essential element of all their tort and implied warranty claims."). *See also Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (while deciding the case on other grounds, noting that "while we recognize that the fear of an unknowable, but potentially fatal, defect in a heart valve is perfectly rational, and almost certainly sincere, we have serious concerns about permitting recovery for such fear absent actual failure of the valve"); *Bravman v. Baxter Healthcare Corp.*, 794 F. Supp. 96 (S.D.N.Y. 1992) ("New York generally does not recognize a cause of action for a faulty heart valve until the valve actually fails and causes a physical harm."), aff'd in part and rev'd in part, 984 F.2d 71 (2d Cir. 1993); *Pfizer, Inc. v. Farsian*, 682 So. 2d 405, 407 (Ala. 1996) ("Alabama courts have never allowed a recovery based on a product that . . . is and has been working properly.").

The cases cited by Plaintiffs do not support their contention that they have suffered an actionable tort injury. In *San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 44 Cal. Rptr. 2d 305 (1995), the plaintiff school district sued for damages resulting from the presence

of asbestos-containing products in some of its school buildings. In the context of determining when the statute of limitations began to run on the plaintiff's claims, the court considered the issue of "what constitutes the element of damage for purposes of strict liability and negligence." *Id.* at 1327, 44 Cal. Rptr. 2d at 310. The court determined that the mere presence of asbestos in a building did not constitute an actionable injury for tort purposes, because "the mere presence of asbestos constitutes only a threat of future harm." *Id.* at 1330, 44 Cal. Rptr. 2d at 315. Instead, tort injury occurs when asbestos contamination occurs--that is, when asbestos fibers are released into the air of the building. *Id.* at 1334, 44 Cal. Rptr. 2d at 314. It is at that point that the health of the occupants of the building is threatened, and therefore it is at that point that a tort injury has occurred.

Application of this holding to the facts of the instant case makes it clear that simply owning tires or a vehicle with a defect is much like owning a building with asbestos in it. Plaintiffs are faced with the threat that the tires may suffer from a tread separation incident at any given moment, or that their vehicle will roll over in the event of an accident, in the same way the building owner is faced with the threat that the asbestos may escape into the air at any given moment. But until that occurs, no legally cognizable tort has been committed.[16]

Neither does *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), support Plaintiffs' position. In that

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[16] Plaintiffs suggest that the abnormal deterioration and fatigue cracks in the Tires are analogous to the first asbestos fiber escaping into the air. We disagree. There is no allegation by Plaintiffs that the fatigue cracks themselves affect the performance of the Tires, just as the presence of contained asbestos does not affect the safety of the air in the building. Rather, a tire's performance is not affected until it suffers a tread separation; it is this event that is analogous to the release of an asbestos fiber into the air.

case, the plaintiffs alleged that they were exposed to PCBs released into the environment by the defendants, and that as a result they suffered immune system damage that left them susceptible to a variety of illnesses, none of which they had yet contracted. The plaintiffs asserted that they were required to undergo medical monitoring so that if they ultimately did contract an illness as a result of their PCB exposure, it would be detected and treated as early as possible. The plaintiffs sought to recover the cost of that medical monitoring from the defendants. In determining that the "non-traditional tort" of medical monitoring did exist under Pennsylvania law, the court made clear that its holding was based upon a policy decision that plaintiffs who are exposed to toxic substances and must undergo medical surveillance as a result are entitled to a remedy. The court acknowledged the fact that traditional tort law would not provide such plaintiffs with a remedy, because they could not demonstrate the manifest injury usually required for a tort claim. Therefore, it was necessary for a new tort cause of action--one with the very narrow remedy of compensation for necessary medical monitoring--to be created in order to fill the void. Obviously, this narrow new tort is wholly inapplicable to Plaintiffs' claims in this case, and Plaintiffs' attempt to analogize their request for replacement tires to the remedy of medical monitoring is, while creative, ultimately unavailing.[17]

For the reasons set forth above, as to all Plaintiffs except Gustafson, Wehking, and Simpson, Plaintiffs' Thirteenth Claim for Relief is hereby **DISMISSED**, pursuant to Federal

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[17] Also unavailing is Plaintiffs' reliance on another medical monitoring case, *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193 (N.D. Cal. 1987). In that case, the court accepted as true the plaintiff's allegation that he "has suffered a direct injury to his immune system" as a result of exposure to toxic substances. Therefore, the court determined that the plaintiff had asserted a present physical injury, sufficient to support a traditional tort claim.

Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted.

B. RICO Claims

Plaintiffs' claims asserted in their Second through Seventh Claims for Relief of the Master Complaint are based on the federal RICO Act. They allege on behalf of the Tire Class (Second Claim for Relief) and the Explorer Diminution Class (Third Claim for Relief) that defendants received income from a pattern of racketeering[18] and used or invested that income to operate and expand the enterprises defined in the Master Complaint,[19] all in violation of 18 U.S.C. § 1962(a). Master Complaint, PP 239, 266. On behalf of the Tire Class (Fourth Claim for Relief) and the Explorer Diminution Class (Fifth Claim for Relief), Plaintiffs allege that the defendants conducted and/or participated in the conduct of the affairs of the "enterprises" through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). *Id.* at PP 274, 284. In Sixth Claim for Relief (on behalf of the Tire Class) and Seventh Claim for Relief (on behalf of the Explorer Diminution Class), Plaintiffs allege that Defendants conspired, in violation of 18 U.S.C. § 1962(d), to commit the aforementioned violations of sections 1962(a) and 1962(c). *Id.* at PP 291, 295.

In order to maintain a civil action for damages under any of these theories, 18 U.S.C. § 1964 requires that a plaintiff

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[18] Briefly stated, the "pattern of racketeering" described in the Master Complaint refers to Defendants' acts in furtherance of their alleged fraudulent scheme "to deceive the automotive buying and leasing public regarding the features, safety, quality, and value" of the Tires and Explorers. *Id.*

[19] The Master Complaint defines three enterprises: Ford and Firestone as an association-in-fact enterprise (the "Domestic Enterprise") (*id.* at P 211), and Ford, Firestone, and Bridgestone as an association-in-fact enterprise (the "International Enterprise") (*id.* at P 214), and the Bridgestone-Firestone Enterprise (*id.* at P 247).

plead and prove that he has been "injured in his business or property by reason of a violation of section 1962." Just as Defendants maintain that Plaintiffs have not pled a cognizable injury to support their negligence claims, they also argue that all of Plaintiffs' RICO claims must fail for lack of the requisite injury to business or property.

For each of the RICO claims asserted on behalf of the Tire Class, Plaintiffs allege that they have been injured because:

> they have been forced to bear the financial loss associated with the cost of replacing the Tires and/or the diminished value of their vehicles equipped with the Tires now that the truth regarding their safety and lack of roadworthiness is known. Plaintiffs and the Tire Class were also injured because Defendants withheld information about safety risks concerning the Tires which, if known, would have caused consumers not to buy or lease, or to pay substantially less for, the Tires or vehicles equipped with the Tires.

Master Complaint, PP 241, 278, and 292.[20] Plaintiffs further allege that Defendants' RICO violations have injured the Explorer Diminution Class because:

> they have been forced to bear the financial loss associated with the diminished value of their Explorers now that the truth regarding their safety and lack of roadworthiness is known. Plaintiffs and the Explorer Diminution Class were also injured because defendants withheld information about the safety risks concerning the Explorer which, if known, would have caused consumers not to pur-

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[20] Plaintiffs have employed slight, immaterial wording differences among the cited paragraphs.

chase or lease, or to pay substantially less for, Explorers.

Id. at PP 268, 288, and 296.[21]

The Master Complaint does not allege that those Plaintiffs who have replaced their tires did so as a result of their tires failing, nor does it allege that Plaintiffs suffered any pecuniary loss as the result of actual tire failure.[22] The Master Complaint also does not allege that any plaintiff has incurred an actual monetary loss as the result of the alleged diminished value of the Tires or Explorers by selling or attempting to sell them.

The nature of Plaintiffs' alleged RICO injuries are thus of two general but interdependent types. First, they claim that the Tires (or vehicles equipped with them) and Explorers are not worth what they paid for them or that they would not have bought them at all. In other words, their injury is the diminished value of their property. Second, Plaintiffs claim to have been injured because they have expended money--either in purchasing the Tires and/or Explorers or in replacing allegedly defective tires. We hold that these allegations do not satisfy the injury to business or property requirement of 18 U.S.C. § 1964.

Federal courts have consistently and repeatedly held that to satisfy the injury requirement of section 1964, a plaintiff must prove an actual, concrete monetary loss (i.e., an "out-

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[21] *See supra* note 20.

[22] The Court notes that a few individual plaintiffs have alleged that they incurred replacement costs following tread separation or tire "failures." Both the Master Complaint and Plaintiffs' brief make clear, however, that Plaintiffs have not based their claim of RICO injury on replacement following tire failure, nor have they requested relief on behalf of a class so defined. This portion of the Court's Order therefore does not apply to these individuals to the extent they may later choose to assert individual RICO claims based on replacement costs incurred.

of-pocket" loss). *See, e.g., In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 523 (5th Cir. 1995) (RICO claim dismissed for failure to show conclusive financial loss); *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70-71 (9th Cir. 1994) (patients who had not paid out money as a result of alleged scheme that reduced their insurance benefits could not show required concrete financial loss); *Dornberger v. Metropolitan Life Ins.*, 961 F. Supp. 506, 521-22 (S.D.N.Y. 1997) (RICO injury requires showing of actual, out-of pocket financial loss). An injury that is speculative or contingent on future events that may or may not occur is insufficient to satisfy the injury requirement. *See, e.g., Imagineering v. Knighten Bros. Construction*, 976 F.2d 1303, 1310-11 (9th Cir. 1992) (RICO claim dismissed because alleged injury required speculation that other events would have occurred); *Lincoln House v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (allegation of RICO injury that is contingent on outcome of separate litigation is purely speculative and not ripe for resolution); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 24 (2d Cir. 1990) (plaintiff's allegation that RICO violation would cause him to lose commissions in future too speculative to satisfy injury requirement); *Arabian American Oil. Co. v. Scarfone*, 713 F. Supp. 1420, 1421 (M.D. Fl. 1989) (speculation that injury might be inflicted is insufficient to state RICO claim); *Anitora Travel v. Lapian*, 677 F. Supp. 209, 216 (S.D.N.Y. 1988) (no RICO injury absent allegation of actual, present injury, rather than speculative injury that may only possibly occur in the future).

Guided by these principles, we turn to an examination of Plaintiffs' specific allegations of the injury caused by Defendants' RICO violations. As noted above, Plaintiffs allege, both on behalf of the Tire Class and the Explorer Diminution Class, that Defendants' fraudulent conduct induced them to purchase tires and/or vehicles that, because of their inherent defects, are of diminished value. They maintain that they have suffered an injury for which RICO provides a remedy

because they "paid inflated prices to buy or lease products the market has now devalued because their previously concealed design defects render them unsafe." Plaintiffs' Opposition at 43.[23] According to Plaintiffs, these diminished values, along with the "out-of-pocket costs Plaintiffs are paying to replace inherently defective tires," demonstrate that Plaintiffs "have already sustained real pecuniary losses." *Id.*

Despite their description of injury in the past tense, Plaintiffs' assertion of financial loss is grounded in the possibility of future events that may cause them to suffer the loss associated with the products they claim are defective or diminished in value: the tires that they have unilaterally replaced or may replace in the future may suffer tread separation; they may receive on trade-in or resale of their Explorers (or other vehicles equipped with the Tires) less than they would have received absent the alleged defects. As numerous appellate and district courts have held, however, RICO affords a monetary remedy only to plaintiffs who have actually realized the diminished value or experienced product failure, and not to those who allege a risk (or even a probability) of such loss.

In *Maio v. Aetna*, 221 F.3d 472 (3d Cir. 2000), the Third Circuit recently addressed a similar claim. The plaintiffs were insured members of an HMO plan provided by Aetna. They asserted RICO claims based primarily on the defendants' alleged fraudulent advertising about the quality and features of the HMO plan, maintaining that they were injured because the defendants actually maintained procedures and practices inconsistent with their advertising campaign. Specifically, the plaintiffs alleged that the defendants' RICO violations caused them to pay "more for their HMO plans than those plans were worth." *Id.* at 480.

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[23] Plaintiffs suggest that the diminished value is reflected in standard market guides such as the Kelly Blue Book. *Id.* at 45.

Relying on numerous RICO decisions requiring tangible financial loss, the Third Circuit rejected the plaintiffs' "overpayment" theory of RICO injury. The court held that:

> appellants cannot establish that they suffered a tangible economic harm compensable under RICO unless they allege that health care they received under Aetna's plan actually was compromised or diminished as a result of Aetna's management decisions challenged in the complaint . . . . There is no factual basis for appellants' conclusory allegation that they have been injured in their "property" because the health insurance they actually received was inferior and therefore "worth less" than what they paid for it.[24]

Id. at 488.[25] The Third Circuit's discussion of the plaintiffs' diminution in value theory is particularly instructive in this case:

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[24] The court went on to explain that the requisite actual losses would have to be alleged and proven on an individual basis. *Id.* at 488.

[25] Plaintiffs make much of the fact that the Third Circuit distinguished the "health care product" at issue, which it characterized as a contractual right to receive medical benefits, from property of a tangible nature. *See id.* at 488-89. That distinction was, in fact, only one of three independent grounds for the court's holding. The other two grounds, discussed below, are fully applicable here.

We note here also that one federal district court has recently refused to draw the distinction made by the *Maio* court to which Plaintiffs refer. In *In re Managed Care Litigation*, 150 F. Supp. 2d 1330, 2001 WL 660869 (S.D. Fl. 2001), the court found that the dichotomy drawn in Maio between tangible property interests and health care contracts that have not been breached was inappropriate because the insureds' claims were more like fraudulent inducement claims than claims for breach of contract. *Id.* at *4-5. The court did not expressly address the other bases for the *Maio* court's ruling and it declined to address at that juncture whether the evidence would support the plaintiffs' allegation of injury. *Id.* at *6.

> We also reject appellants' theory of RICO injury resting on the purported diminution in product value because, . . . as a matter of simple logic, they obviously cannot show that they actually received something "inferior" and "worth less" absent individualized allegations concerning the quantity and quality of health care benefits Aetna provided under its HMO plan. Put differently, assuming *arguendo* that the injury claimed is predicated solely on the alleged financial loss of premium dollars stemming from appellants' purchase of an "inferior health care product," the harm alleged, *i.e.*, overpayment, cannot exist absent proof of some level of inferior treatment under Aetna's HMO plan.
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> Rather, the occurrence of an injury-causing event such as, for example, a denial of adequate care or a delay in treatment is viewed more appropriately as the contingency upon which appellants' economic damages are dependent. In other words, allegations of the foregoing nature are necessary to provide the factual basis for appellants' otherwise conclusory allegation that they have been injured in their "property" because they overpaid for Aetna's inferior health care product.

Id. at 492-94.

Like the HMO enrollees in *Maio* who alleged they had overpaid for an inferior product, Plaintiffs here have not suffered cognizable RICO injury by virtue of their purchases of the Tires or Explorers, absent particularized allegations of the inferior performance of those products. The actual failure of the Tires or Explorers, like the failure of the HMO plans to provide the quality care advertised, is a contingency upon which Plaintiffs' economic damages are dependent.

The *Maio* court also found the plaintiffs' theory of RICO injury untenable because it was predicated on the conclusion that the economic value of the product purchased was reduced because of the *possibility* that the alleged inferiority of the product would manifest itself at some point in the future, just as Plaintiffs here allege that the possibility of tire or vehicle failure reduces their property's value or necessitates replacement. The court rejected the notion that present economic harm has been alleged when it "necessarily is contingent upon the impact of events in the future which have not yet occurred." *Id.* at 494-95. That theory, the court held, requires impermissible factual speculation about events that may not occur and would "expand[] the concept of RICO injury beyond the boundaries of reason." *Id.* at 496.

Similarly, in *First Nationwide Bank v. Gelt Funding*, 27 F.3d 763 (2d Cir. 1994), the Second Circuit upheld the dismissal of RICO claims because the plaintiff had not yet incurred an actual injury. The plaintiff bank claimed that the defendants had fraudulently induced it to make non-recourse loans by misrepresenting the value of the properties pledged as collateral. The bank was injured, it alleged, because it had lent more funds than it would have had it known the true value of the collateral and was thus undersecured for the excess amounts. The bank also alleged injury as a result of having to increase its reserves to cover the potential risk of the borrowers' default. The bank did not allege, however, that the fraudulently induced loans were in default or that it had had to foreclose on the insufficient collateral. *Id.* at 766-67.

The Second Circuit noted that, under the bank's theory, it would have been injured even if the loans were ultimately repaid in full with interest, *id.* at 767-68, just as Plaintiffs in this case would recover under their theory even if their tires and/or Explorers perform without failure throughout their normal useful life and even if they never actually lose money by selling them. Nevertheless, the *Gelt* plaintiff argued that it

suffered an "immediate quantifiable injury when the loans were made because . . . [it] assumed additional risk of loss, and 'for all practical purposes the[ ] additional funds were lost the moment the loans were made.'" *Id.* at 768. That argument, nearly identical to the argument of Plaintiffs here that they sustained a monetary injury as soon as they purchased the Tires and/or Explorers, or "as soon as the rubber hit the road," did not persuade the Second Circuit:

> We reject FNB's novel theory that it was damaged simply by being undersecured when, with respect to those loans not yet foreclosed, the actual damages it will suffer, if any, are yet to be determined.[26]

Id.

The failure to allege the plaintiff's actual realization of her property's diminished value led to dismissal of the RICO

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[26] The holding in *Gelt* illustrates the distinction between an unrealized (even if theoretically demonstrable) diminution in value from the type of actual, concrete injury required by 18 U.S.C. § 1964. We are aware, just as the Second Circuit was undoubtedly aware, that the secondary market for commercial paper might have placed a value on the subject loans determined in part by the actual value of the collateral and that it might have been possible to quantify the diminution in value attributable to the inadequacy of the collateral. Similarly here, Plaintiffs maintain that they can show diminution in a generalized manner by reference to standard market guides, and we accept that assertion for purposes of this motion. However, diminished value as a commercial concept is plainly not a RICO injury unless and until a plaintiff actually realizes a loss occasioned by it. The wisdom of that requirement was recognized by the Second Circuit. The lender in *Gelt* may, for example, have held onto the loans, betting against default and foreclosure, and hence, not have suffered a concrete monetary loss at all, just as a Tire or Explorer owner may bet against failure and never realize an actual loss. (Whether it is prudent for an owner to take what Plaintiffs would assert is a significant risk is not the issue, and Plaintiffs wisely do not argue that increased risk constitutes a RICO injury. *See, e.g., Dornberger*, 961 F. Supp. at 522 (increased risk not a RICO injury) (citing several authorities)).

claims asserted in *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783 (9th Cir. 1992) (*en banc*). The plaintiff, a tenant in an apartment building, brought a RICO action against the owner and tenants of a neighboring apartment building. She claimed that the illegal conduct of her neighbors had decreased the value of her property. The Ninth Circuit upheld the district court's dismissal of her RICO claim because she did not allege that she had ever sublet or tried to sublet her apartment, or "even that she ever wished or intended to sublet the apartment." Her alleged loss was, according to the Ninth Circuit, "therefore purely speculative." *Id.* at 787.[27] *See also Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 765 (N.D. Ill. 1998) (allegation that plaintiff would lose the fair market value of his property in the future insufficient to support RICO claim).

Substantial support for our conclusion that Plaintiffs' diminished value theory does not satisfy the requirements of section 1964 can also be found in a recent unpublished decision of the District of Columbia district court. In *Tri-State Express v. Cummins Engine*, Civ. A. 99-00220 (HHK) (D.D.C. September 11, 2000), the court dismissed the RICO claims of truck owners who alleged that they had been injured because the defendants' conduct had "reduced the present economic value" of their trucks and engines. *Id.*, slip op. at 6. Relying, as we have, on *Maio*, *Gelt*, and *Steele*, the court held that the plaintiffs had not alleged any realized, concrete injury as a result of the alleged defects, "but only the potential for harm," and that the speculative or future in-

[27] The court also based its holding on its unwillingness to treat the plaintiff's property interest as a renter the same as that of an owner of real property, finding her injury to be more in the nature of personal discomfort or annoyance, which is not compensable under RICO. *See* 965 F.2d at 786-87.

juries suggested by the plaintiffs were "insufficient to activate RICO's remedial scheme." *Id.*, slip op. at 13-14.[28]

The principle that emerges from all of the decisions discussed above is that a plaintiff alleges a cognizable injury (one that is concrete, tangible, and not speculative or contingent) as a result of a purchase only where the diminished value of the plaintiff's property has actually been realized or when the alleged infirmity in the purchased property has otherwise tangibly manifested itself. For this reason, Plaintiffs' allegations that they paid more for the Tires and Explorers than they are worth, or that they have incurred or will incur the cost of replacing Tires that have never manifested the alleged defect, are insufficient to sustain their RICO claims.[29]

None of the RICO decisions cited by Plaintiffs counsels a different conclusion.[30] The court in *Kaushal v. State Bank of*

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[28] Plaintiffs' attempt to distinguish this holding (*see* Plaintiffs' Opposition at 52-53) is unavailing. Nothing in that court's analysis suggests that it based its conclusion regarding the lack of RICO injury on the existence of a consent decree, the likelihood of fines, or the assertion that only the environment, and not the plaintiffs, suffered injury related to the higher emission levels at issue.

[29] We take judicial notice of the fact that in late May of this year, Ford announced that it would replace many, if not most, of the tires that are the subject of the Master Complaint and would reimburse certain owners who had already replaced tires at their own expense. The diminution in value and replacement costs alleged as injury to the Tire Class may, therefore, never be realized for this reason alone. Although we in no way base our holding on this fact because it is outside the pleadings (nor do we suggest that these costs or associated costs alleged in the Master Complaint cannot be recoverable under any theory), it does illustrate a purpose of RICO's requirement that the injury alleged be concrete and not speculative or contingent.

[30] Some of them do not even address the injury issue, likely because the allegation of present injury was plainly sufficient. In *Emery v. American General Finance*, 71 F.3d 1343 (7th Cir. 1995), for example, the plaintiff alleged that she had paid and was continuing to pay more for

India, 1988 U.S. Dist. LEXIS 11988 (N.D.Ill. 1988), addressed the RICO injury requirement in the context of a purchase of a business. The plaintiffs alleged that they were induced by fraud to purchase a company that had concealed debt--non-contingent liability--that had produced an immediate, quantifiable loss. *Id.* at *8. *See also Grove Holding v. First Wisconsin Nat'l Bank*, 803 F. Supp. 1486, 1509 (E.D. Wis. 1992) (RICO injury where plaintiffs had purchased company, the assets and liabilities of which had been misrepresented). In the remaining decisions cited by Plaintiffs, the courts found the injury requirement to have been met because the monetary loss had already been incurred or the infirmity in the product purchased had already manifested itself. *See Lentz v. Pan American*, 1991 U.S. Dist. LEXIS 16445 (E.D. Pa. 1991) (plaintiff purchased security services he did not receive); *In re Synthroid Marketing Litigation*, 188 F.R.D. 295 (N.D. Ill. 1999) (loss occurred upon pur-

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credit than she would have paid had the defendant not engaged in fraudulent "loan flipping." As the Seventh Circuit noted, the plaintiff had paid $ 1200 to borrow $ 200, or roughly three times what she would have paid absent the alleged fraudulent conduct. *Id.* at 1345-46. Unlike this case, no speculation was necessary to make this calculation, and her out-of-pocket loss awaited the occurrence of no contingency. *SK Hand Tool v. Dresser Industries*, 852 F.2d 936 (7th Cir. 1988), also does not specifically address the injury requirement. Rather, the court dismissed the RICO claims for failure to allege the required pattern of racketeering activity. *Id.* at 940-43. In any event, the allegation of injury in *SK Hand Tool* was of a present, non-contingent loss premised on the plaintiff's purchase of a business as to which the defendants had concealed liabilities and misrepresented the inventory. *Id.* at 938. On the day the plaintiff purchased the business, therefore, it received more liabilities and less inventory than it had paid for. The buyer's loss was immediate because it did not depend on any future contingency. In *Line v. Astro Manufacturing*, 993 F. Supp. 1033 (E.D. Ky. 1998), the court also did not reach the issue presented here. The court merely held that the plaintiffs had not alleged a RICO injury because the houses they had purchased were not worth less than what the plaintiffs had paid for them. The court therefore had no reason to (and did not) opine on the point at which non-existent damages might have accrued. *See id.* at 1037.

chase; not dependent on any future event); *In re Merrill Lynch Limited Partnerships Litigation*, 7 F. Supp. 2d 256 (S.D.N.Y. 1997) (plaintiffs' injuries not speculative because allegation was that limited partnerships purchased could, at point of their purchase, never achieve their promised objectives). The allegations of RICO injury in this case are very different from the allegations made in the cases Plaintiffs rely upon. Whether Plaintiffs received what they allege they paid for (tires and vehicles that perform as warranted) is contingent on future events that may or may not occur.

One decision cited by Plaintiffs, *In re Cordis*, 1992 U.S. Dist. LEXIS 22612, 1992 WL 754061 (S.D. Ohio 1992), does appear to lend support to Plaintiffs' position that they can recover under RICO for diminished value and replacement costs. In that case, the district court found that the plaintiffs who alleged they had purchased faulty pacemakers had adequately alleged an injury under section 1964 for "the diminished value of the product and the costs associated with implanting and explanting the product." *Id.* at *3. In reaching this conclusion, the court drew analogies to recoveries by purchasers in the antitrust and securities fraud contexts and found no basis for "a principled distinction" between those purchasers and the purchasers of the allegedly defective pacemakers. *Id. Cordis* is distinguishable from this case on two grounds. First, it is not entirely clear that the *Cordis* court assumed that any contingency was involved, i.e., whether the plaintiffs' pacemakers would ultimately be removed and replaced. Second, the court dismissed the plaintiffs' RICO claims for failure to allege an enterprise, so its discussion of injury was not necessary to its judgment.

Notwithstanding these distinctions, one could plausibly conclude that the result we reach here cannot fairly be harmonized with the analysis employed in *Cordis*. If that is so, we decline to follow *Cordis*. First, as noted above, the weight of authority on the issue presented is decidedly con-

trary to the analysis of *Cordis*. Moreover, because *Cordis* was decided in 1992, the court did not have the benefit of this weight of authority, including the Third Circuit's decision on in *Maio*, the Second Circuit's decision in *Gelt*, and the Ninth Circuit's decisions in *Oscar* and *Steele*. Second, we *do* see the basis for a principled distinction between the losses alleged by Plaintiffs here and the purchase loss of a plaintiff in the antitrust or securities fraud context. Although the *nature* of the injury to business or property required by the RICO Act does not differ appreciably from the nature of the injury required to sustain an antitrust or securities fraud claim, the *accrual* of the injury may differ based on the facts alleged and the legal theory employed.[31]

For all the reasons stated above, we hold that Plaintiffs have not alleged an injury cognizable under 18 U.S.C. § 1964. The Second through Seventh Claims for Relief of the Master Complaint are thus hereby **DISMISSED**.

C. Claims under Consumer Protection Statutes

In their Tenth Claim for Relief, entitled "Violation of All States' Consumer Protection Statutes," Plaintiffs allege the following:

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[31] An antitrust plaintiff who purchases a good at a price inflated by virtue of the defendant's anticompetitive conduct generally is injured at the point of purchase. If, for example, she has paid three dollars for a good that, but for the antitrust violation, would have cost two dollars, she has been injured at the moment of purchase and no future contingency (such as the sale or replacement of the good or the failure of the good) must occur before she actually has sustained an out-of-pocket loss. Similarly, a plaintiff who has purchased a security in reliance on material misrepresentations sustains a present loss not contingent on any future event. As the cases in the preceding discussion involving the purchase of a business illustrate, the purchaser of a company (including a purchaser of securities) immediately incurs a loss when the company's assets and liabilities have been misrepresented, because what the purchaser has or has not received is not dependent on any future event.

308. [Defendants] engaged in unfair competition or unfair or deceptive acts or practices in violation of any and all state consumer protection statutes when they represented, through their advertising, warranties, and other express representations, that the Tires and Explorers had benefits or characteristics that they did not actually have. [Defendants] further violated state consumer protection statutes when they falsely represented that the Tires and Explorers were of a particular standard or quality when they were not. Finally, [Defendants] violated state consumer protection statutes when they advertised the Tires and Explorers with the intent not to sell them as advertised, and when, in so doing, they concealed and suppressed facts material to the true characteristics, standards, and quality of these products.

309. [Defendants'] deceptive practices were specifically designed to induce Plaintiffs and the Classes to buy the Tires and Explorers.

310. To this day, [Defendants] continue to engage in unlawful practices in violation of state consumer protection statutes.

311. As a direct and proximate result of [Defendants'] unfair methods of competition and unfair or deceptive acts or practices, Plaintiffs and the Classes have suffered actual damages and members of the Classes are threatened with irreparable harm by undue risk of physical injuries or death.

In short, Plaintiffs allege the basic components of a consumer protection claim-unfair or deceptive acts or practices, committed in the pursuit of trade or commerce, which result in loss.

As in their arguments for dismissing the negligence and RICO claims, Defendants contend that all Plaintiffs except those who have suffered a tread separation fail to state a claim because they do not plead injury. Reply Brief III at 13-14. Defendants' argument, though successful to defeat Plaintiffs' negligence and RICO claims, is unconvincing in the realm of consumer protection claims. Rather than injury, as required for RICO or negligence claims, to state a consumer protection cause of action, Plaintiffs need plead only "loss." The TCPA provides that "any person who suffers an *ascertainable loss* of money or property . . . as a result . . . of an unfair or deceptive act or practice . . . may bring an action individually to recover actual damages." Tenn. Code Ann. § 47-18-109(a)(1) (emphasis added). The MCPA similarly sets forth a claim for the greater of actual damages or $ 250.00 for "[a] person who suffers *loss* as a result of a violation of this act." Mich. Comp. Laws § 445.911(b)(2) (emphasis added).[32]

Defendants argue that Plaintiffs cannot recover under the relevant consumer protection statutes because they "have not alleged that they experienced any manifestation of the alleged defect or injury." Brief III at 3. Courts interpreting the terms "ascertainable loss" and "loss" in consumer protection statutes disagree. For instance, in *Hinchliffe v. American Motors Corp.*, 440 A.2d 810, 813-14 (Conn. 1981), the Supreme Court of Connecticut interpreted the term "ascertainable loss" in the Connecticut Unfair Trade Practices Act ("CUTPA"), ruling that a consumer who had bought a vehi-

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[32] While the MCPA refers to "loss," Mich. Comp. Laws § 445.911(b)(2), and the TCPA refers to "ascertainable loss," Tenn. Code Ann. § 47-18-109(a)(1), the Court sees no reason to interpret the two terms differently in determining whether Plaintiffs have stated a claim under the relevant state consumer protection statutes. *See Miller v. American Family Publishers*, 663 A.2d 643, 655 n.10 (N.J. Super. Ct. Ch. Div. 1995) (finding no significant difference between "loss" and "ascertainable loss").

cle advertised as "full-time four-wheel drive" but was actually equipped with a "limited slip differential mechanism" suffered a loss under CUTPA. In so ruling, the Court reasoned that "whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property." 440 A.2d at 814. Here, Plaintiffs allege, among other claims, that they expected to receive Tires and Explorers "of a particular standard or quality" but actually received Tires and Explorers of a lower standard or quality. Master Complaint, P 308. Such an allegation is a classic example of "receiving something other than what [they] bargained for." *See Hinchliffe*, 440 A.2d at 814. Furthermore, unlike with RICO claims, this alleged diminution in value satisfies the loss requirement. *Compare Maio*, 221 F.3d at 492 ("We also reject appellants' theory of RICO injury resting on the purported diminution in value because, . . . as a matter of simple logic, they obviously cannot show that they actually received something 'inferior' and 'worth less' absent individualized allegations concerning the quantity and quality of health care benefits Aetna provided under its HMO plan.") with *Hinchliffe*, 440 A.2d at 814 ("Obviously such diminution [in value] would satisfy the statute.").

The Court views as convincing this interpretation of the New Jersey and Connecticut consumer protection statutes and concludes that the interpretation is equally applicable to the TCPA and the MCPA. In fact, a claim quite similar to Plaintiffs' claim has been specifically recognized by the Court of Appeals of Michigan. In *Mayhall v. A.H. Pond Co., Inc.*, 341 N.W.2d 268, 271-72 (Mich. Ct. App. 1983), the court ruled that the plaintiff stated a "loss" under the MCPA when he alleged that the diamond ring he purchased was advertised as "guaranteed perfect" but actually was flawed. The Michigan court reasoned that "the injury suffered by a victim of fraud [is failure to] receive what he expected to receive." 341 N.W.2d at 271. Loss, under a consumer protection claim, can arise from the "frustration of [the plaintiff's] ex-

pectations," as created by the defendant. *Id.* This aspect of consumer protection claims also distinguishes them from RICO claims. Because the loss in a consumer protection claim can arise solely from receiving something *different from*, rather than *less than*, what was represented to the plaintiff, the contingency of the alleged loss is not a barrier to stating a claim here as it is in the RICO context. *See also Hinchliffe*, 440 A.2d at 814 ("To the consumer who wishes to purchase an energy saving compact, for example, it is no answer to say that he should be more satisfied with a more valuable gas guzzler.").

Finally, it is of no consequence that most Plaintiffs have not alleged that they tried to sell, trade in, or replace their Tires or Explorers. The court in *Mayhall*, 341 N.W.2d at 270, addressed whether an injury to the plaintiff's pocketbook was necessary to state a claim and found that it was not required. Plaintiffs need not allege that they ever tried to sell or trade in their tires or vehicles or that they experienced tread separation in order to state a loss.

Because the TCPA and the MCPA require only that Plaintiffs allege a loss, and Plaintiffs have do so, Plaintiffs' claim for violation of state consumer protection statutes will not be dismissed for failure to allege manifest injury.

D. Claims for Breach of Implied Warranty

In their Twelfth Claim for Relief, entitled Breach of Implied Warranty, Plaintiffs allege the following:

> 320. [Defendants] impliedly warrant that the Tires and Explorers, which they designed, manufactured and sold to Plaintiffs and the Classes, pass without objection in the trade, are fit and merchantable for their ordinary use, are not otherwise injurious to consumers, and are adequately contained, packaged and labeled.

> 321. Because of the undisclosed unreasonably dangerous propensity of the Tires to experience a sudden and substantial tread separation, the Tires cannot pass without objection in the trade, are unsafe, unmerchantable, and unfit for their ordinary use when sold, are not adequately contained, packaged and labeled, and threaten injury to Plaintiffs and members of the Classes.
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> 322. Because of the undisclosed unreasonably dangerous propensity of the Explorers to roll over, the Explorers cannot pass without objection in the trade, are unsafe, unmerchantable, and unfit for their ordinary use when sold, are not adequately contained, packaged and labeled, and threaten injury to Plaintiffs and members of the Classes.
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> 323. As a direct and proximate result of [Defendants'] breach of implied warranty, Plaintiffs and the Classes have suffered actual damages and members of the Classes are threatened with irreparable harm by undue risk of physical injuries and death.

In other words, Plaintiffs allege that each Defendant has breached the implied warranty of merchantability by selling, respectively, defective Tires and Explorers.

Both Michigan and Tennessee have adopted Uniform Commercial Code § 2-314, the section that establishes an implied warranty of merchantability in the sales of goods by merchants. *See* Mich. Comp. Laws § 440.2314; Tenn. Code Ann. § 47-2-314.[33] Defendants argue that Plaintiffs may not maintain an action for breach of the implied warranty of merchantability for the same reason that their negligence and

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[33] Both states also have adopted the correlating section relating to leases, U.C.C. § 2A-212. *See* Mich. Comp. Laws § 440.2862; Tenn. Code Ann. § 47-2A-212.

RICO claims fail: they do not allege that they have suffered any manifest injury. However, U.C.C. § 2-725(2), which also has been adopted by both Tennessee and Michigan, expressly provides otherwise:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods[34] and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Mich. Comp. Laws § 440.2725(2); Tenn. Code Ann. § 47-2-725(2). "Accrue" is defined as "to come into existence as a claim that is legally enforceable." *American Heritage Dictionary* (3d Ed. 1992); *see also Black's Law Dictionary* (5th Ed. 1979) ("A cause of action 'accrues' when a suit may be maintained thereon."). Therefore, by the plain language of the statute, each Plaintiff's cause of action for breach of implied warranty accrued at the time he or she purchased an

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[34] This exception does not apply to implied warranties. *See* Hawkland, *Uniform Commercial Code Series* § 2-725:02 (1994 ed.) ("By definition, an implied warranty is not explicit, and, therefore, the exception has no application to implied warranties. Stated differently, the statute of limitations will always start to run against claims based on implied warranty from the time when delivery of the goods is tendered."); *accord Antz v. GAF Materials Corp.*, 719 A.2d 758, 760 (Pa. Super. Ct. 1998); *Washington Freightliner, Inc. v. Shantytown Pier, Inc.*, 719 A.2d 541, 545 (Md. 1998); *Cosman v. Ford Motor Co.*, 674 N.E.2d 61, 66 (Ill. App. Ct. 1996); *Champion Home Builders, Inc. v. Hodge*, 602 So. 2d 399, 400 (Ala. 1992); *Huff v. Hobgood*, 549 So. 2d 951, 954 (Miss. 1989); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 176 (Tex. App. 1989); *Armour v. Alaska Power Auth.*, 765 P.2d 1372, 1375 (Alaska 1988); *Dickerson v. Mountain View Equip. Co.*, 1710 P.2d 621, 625 (Idaho Ct. App. 1985); *Voth v. Chrysler Motor Corp.*, 545 P.2d 371, 378 (Kan. 1976).

Explorer (as to Ford) or one or more of the Tires (or a vehicle equipped with the Tires) (as to Firestone), and there is no requirement that Plaintiffs demonstrate any injury to their person or property as a result of the breach, but only that they purchased an unmerchantable product.[35]

We are cognizant of the fact that numerous courts have suggested otherwise.[36] *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (holding, without distinguishing between tort and warranty claims, that "since the Plaintiffs have failed to allege any manifest defect and their vehicles perform in a satisfactory manner," the complaint must be dismissed); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (no warranty claim "unless there is actually a failure in product performance"; "mere suspicion of a lost bargain . . . will not support an award of damages"); *In re Air Bag Prods. Liab. Lit.*, 7 F. Supp. 2d at 805 (citation omitted) (in either tort or breach of implied warranty of merchantability claim, there is no cause of action "until there is actual loss or damage"); *Yost v. Gen-*

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[35] The Court does not in this discussion consider whether Plaintiffs can satisfy the other elements required for recovery on a breach of implied warranty claim, only whether they are required to plead manifest injury. Defendants' arguments regarding the other necessary elements are discussed below.

[36] The Court also recognizes the Michigan Supreme Court's statement that "under the common law of products liability, in an action against the manufacturer of a product based upon an alleged defect in its design, 'breach of implied warranty and negligence involve identical evidence and require proof of exactly the same elements.'" *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) (citation omitted). However, neither that case nor any other Michigan case that we have found dealt with the question of whether injury is required to maintain a breach of implied warranty action. Rather, the Michigan Supreme Court's language can best be read as applying to those cases involving personal injury or property damage; in other words, cases involving injury from a defective product, whether under a tort or implied warranty theory, involve the same elements.

eral Motors Corp., 651 F. Supp. 656 (D.N.J. 1986) (damage is a necessary element of breach of warranty claim); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602-03 (S.D.N.Y. 1982) (as to implied warranty claim, rejecting argument that "the purchase of a defective tire, ipso facto, caused economic loss" because tires in question "lived full, productive lives"); *Weaver*, 172 F.R.D. at 96 (finding damages an essential element of breach of warranty, so that plaintiff who alleged defect in child seat but who had not experienced any problem with his child seat had no cause of action); *Bravman*, 794 F. Supp. at 99 (citation omitted) (finding that "consumer claims sounding in tort or breach of implied warranty are substantively the same, requiring the same elements of proof," and both require injury); *but see Rivera v. Wyeth-Ayerst Labs.*, 121 F. Supp. 2d 614 (S.D. Tex. 2000) (plaintiffs who took drug that was withdrawn from the market due to risk of liver damage had properly asserted breach of implied warranty of merchantability claim for purchase price of drug even though they themselves had suffered no liver damage or other health problems); *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex. App. 1995) (buyer of defective software program has warranty action even if he never suffers data loss as a result of the defect because buyer did not get what he bargained for). While couched in terms of whether manifest injury must be pled, the real ground for dismissing most of the cases cited above that are contrary to our conclusion on this point was that the defective products that the plaintiffs had purchased performed satisfactorily throughout their useful life, and therefore the plaintiffs had reaped the benefit of their bargain. That is simply another way of saying that the products were, in fact, merchantable, and therefore there was no breach of warranty. However, if Plaintiffs in this case ultimately can demonstrate that their Tires or Explorers were not merchantable at the time of purchase, they will not be required also to demonstrate that the

Tires or Explorers have malfunctioned in order to maintain a breach of implied warranty claim.

As explained above, to recover under their warranty claims, Plaintiffs need only allege and prove that the Tires or Explorers are *defective*. They are not required to allege and prove the same manifestation of defect necessary to sustain negligence and RICO claims. Defendants' argument assumes that the only way Plaintiffs can prove that Tires are defective is by tread separation and that they only way Plaintiffs can prove that the Explorers are defective is by an active roll-over incident. However, this is a factual assumption that is inappropriate for the Court to embrace in ruling on a motion to dismiss. Plaintiffs allege that the Tires and the Explorers are defective, and as Defendants cannot demonstrate as a matter of law that they are not, we shall assume for purposes of this motion that they are. Therefore, Plaintiffs' claim for breach of implied warranty of merchantability will not be dismissed for failure to allege manifest injury.[37]

E. Claims for Breach of Express Warranty

In their Eleventh Claim for Relief, entitled Breach of Express Warranty, Plaintiffs allege that Defendants "expressly warrant the Tires and Explorers to be free of defects at the time of delivery, which warranties are express warranties within the meaning of section 2-313 of the Uniform Commercial Code" and that Defendants "breached their express warranties by offering for sale, and selling as safe, Tires and

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[37] The Tennessee courts have expressly recognized in other contexts the distinction between a tort action and a breach of warranty action. For example, in *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975), the plaintiffs brought a personal injury and wrongful death claim against a furnace manufacturer. The court held that the plaintiffs' tort and product liability claims accrued at the time the furnace malfunctioned and caused the plaintiffs' injuries; however, the plaintiffs' breach of warranty claims accrued at the time the defendant tendered delivery of the furnace.

Explorers that are, by design, defective in that they are unreasonably dangerous and likely to cause serious injury or death." Master Complaint, PP 314-15. Plaintiffs further allege that as a proximate result of Defendants' breach of the express warranty, Plaintiffs have "suffered actual damages and . . . are threatened with irreparable harm by undue risk of physical injuries or death." *Id.* at P 316. Inasmuch as U.C.C. § 2-725(2) applies to express warranty claims as well as implied warranty claims, and Plaintiffs expressly plead that the express warranty applied to the Tires and Explorers "at the time of delivery," the same analysis applies to both claims. Accordingly, Plaintiffs' express warranty claims are not subject to dismissal for failure to plead manifest injury.[38]

F. Magnuson-Moss Warranty Act Claims

In their First Claim for Relief, entitled Magnuson-Moss Warranty Act, Plaintiffs assert a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1) ("the Act"), which provides, in relevant part:

> Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.

Plaintiffs' claim under the Act is based solely on Defendants' alleged breach of express and implied warranties as set forth in their Eleventh and Twelfth Claims for Relief. Plaintiffs assert that "as a direct and proximate cause of [Defendants'] breaches of express and implied warranties,

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[38] As with the implied warranty claims, Defendants raise a myriad of other reasons why Plaintiffs' express warranty claims should be dismissed; these arguments are addressed below.

[Plaintiffs] have suffered actual economic damages, and are threatened with irreparable harm by undue risk of physical injuries or death." Master Complaint, P 208.

Defendants argue that Plaintiffs cannot show that they have been "damaged" by any breach of warranty, and therefore they cannot maintain an action under the Act. However, Plaintiffs clearly have alleged that they are damaged by the fact that the Tires and Explorers that they purchased are defective, because they paid for non-defective tires and vehicles. As explained in the preceding sections, this is all Plaintiffs are required to allege to maintain an action for breach of warranty under state law. There is absolutely nothing in the Act that suggests any additional requirement under the Act. Indeed, the legislative history of the Act suggests that this is the prototypical type of damage for which the Act was designed to provide a remedy. On this issue, the court's discussion in *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1033 (N.D. Ind. 1981), is instructive:

> [The Act's] central purpose is to create a new and more effective remedial mechanism for consumer claims involving comparatively small amounts of damages. Congress obviously felt that most aggrieved consumers go without redress because their individual claims are too insignificant to command representation by counsel or to warrant all the other expenses of invoking the judicial process. "Because enforcement of the warranty through the courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations." S. Rep. No. 93-151, 93d Cong., 1st Sess. 7 (1973). Congress was also of the view that existing federal and state court procedural requirements offered too many impediments to the maintenance of consumer class actions. *See* H.R. Rep. No. 93-

1107, 93d Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. & Ad. News 7702, 7724 (criticizing requirement of individual notice to potential class members). Accordingly, Congress sought to advance the federal policies expressed in the Warranty Act by fashioning a remedial mechanism for small consumer claims. The court is authorized to award a reasonable sum to defray costs and attorney fees as part of a judgment in favor of a consumer. 15 U.S.C. § 2310(d)(2). This feature obviously was designed primarily for the benefit of consumers having small damage claims. In addition, contrary to the general rule in diversity actions, claims of joined plaintiffs, including members of a plaintiff class, may be aggregated to satisfy the $ 50,000 federal court jurisdictional amount, as long as each member of the plaintiff class is claiming at least $ 25. Id. § 2310(d)(3). The provision allowing aggregation of such small claims is yet another indication that the cause of action provision contemplates rather small damage claims. While the provisions for attorney fees and federal court class actions are the most readily apparent clues to the purposes of the cause-of-action provision, there is also some highly corroborative evidence in the report of the House Commerce Committee: "In this context, your Committee would emphasize that this section (2310(d)) is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers." H.R.Rep. No. 93-1107, 93d Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad. News 7702, 7724. There is only one variety of consumer complaint for which relief "would otherwise not be available," and that is the

> small warranty claim seeking repair, replacement or refund. That is the only kind of claim where the amount in controversy is ordinarily so small that individual private enforcement in the courts is "prohibitively expensive."[39]

In other words, the Act was created, at least in large part, to provide a federal cause of action for consumers saddled with defective products who otherwise would not have suffered sufficient monetary damage to justify bringing a lawsuit, and therefore may not have had a remedy when their warrantor refused to honor the warranty by repairing or replacing the product or refunding the purchase price. That is precisely the position in which Plaintiffs allege they find themselves, and in spite of the cases that suggest otherwise,[40] their claims under the Act are not subject to dismissal because they have suffered no injury beyond not getting the non-defective product for which they paid.

G. Unjust Enrichment Claims

Finally, in their ninth claim for relief, entitled Restitution/Disgorgement for Unjust Enrichment, Plaintiffs allege the following:

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[39] The specific issue the *Gorman* court addressed was whether claims for personal injury caused by breach of warranty may be brought under the Act. The court held that they may not, *Gorman*, 513 F. Supp. at 1035, although perplexingly Defendants cite this case for the proposition that an allegation of personal injury and/or damages is required under the Act. *See* Brief III at 60. Numerous cases have agreed with the holding in *Gorman*. *See, e.g., Boelens v. Redman Homes, Inc.*, 748 F.2d 1058 (5th Cir. 1984); *Bush v. American Motors Sales Corp.*, 575 F. Supp. 1581 (D. Colo. 1984); *Hughes v. Segal Enterprises, Inc.*, 627 F. Supp. 1231 (W.D. Ark. 1986); *Schomber v. Jewel Cos., Inc.*, 614 F. Supp. 210 (N.D. Ill. 1985).

[40] *See Coghlan v. Aquasport Marine Corp.*, 73 F. Supp. 2d 769 (S.D. Tex. 1999), aff'd, 240 F.3d 449 (5th Cir. 2001); *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1295 (1996); *Feinstein*, 535 F. Supp. at 602.

304. As the intended and expected result of their conscious wrongdoing, Defendants have profited and benefitted from the purchase and leasing of Ford Explorers by the Explorer Diminution Class, and the purchase of Tires, and the purchase and leasing of vehicles equipped with the Tires, by the Tire Plaintiffs and the Tire Class.

305. Defendants have voluntarily accepted and retained these profits and benefits, derived from the Plaintiffs and the Plaintiff Classes, with full knowledge and awareness that, as a result of Defendants' fraud and other conscious and intentional wrongdoing, Plaintiffs and the Plaintiff Classes were not receiving products of the quality, nature, fitness, or value that had been represented by Defendants or that Plaintiffs and the Plaintiff Classes, as reasonable consumers, expected.

306. By virtue of the conscious wrongdoing alleged in this Complaint, Defendants have been unjustly enriched at the expense of the Plaintiffs and the Plaintiff Classes, who are entitled to in equity, and hereby seek, the disgorgement and restitution of Defendants' wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court; and such other relief as the Court deems just and proper to remedy the Defendants' unjust enrichment.

Defendants argue that Plaintiffs' lack of manifest injury precludes their claim for unjust enrichment. Specifically, they allege that because any defects in the Tires or Explorers have not manifested themselves, the "plaintiffs received tires and vehicles that have functioned and continue to function property." Brief III at 66.

Under Tennessee law, in order to establish an unjust enrichment claim, Plaintiffs must demonstrate that (1) Plain-

tiffs conferred a benefit upon Defendants; (2) Defendants appreciated the benefit; and (3) it would be inequitable for Defendants to retain the benefit without paying for it. *See B&L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 680 (Tenn. App. 1995) (citing *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154 (1966)). Similarly, under Michigan law, "the elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v. SMH (US), Inc.*, 509 N.W.2d 791, 796 (1993). In this case, Plaintiffs allege that Defendants sold them defective products for the price of non-defective products. If Plaintiffs can demonstrate as a factual matter that their Tires and/or Explorers are, in fact, defective and therefore worth less than they paid for them, then they (at least those who purchased their Tires or Explorers from one of Defendants or Defendants' agents) will have shown that Defendants obtained a benefit (a higher sale price) at the expense of Plaintiffs. The lack of a tread separation or a roll-over incident will not preclude Plaintiffs from maintaining at their unjust enrichment claim, and accordingly we hold that Defendants are not entitled to dismissal of this claim on that basis.

IV. Application of Economic Loss Rule to Certain Plaintiffs

As noted above, three of the named Plaintiffs--Gary Gustafson, William Wehking, and Allan Simpson--allege that they have experienced tread separation incidents with their Firestone tires. Defendants concede that these plaintiffs have asserted an injury in the form of one or more damaged tires. They argue, however, that these plaintiffs' negligence claims are barred by the economic loss doctrine. We share the opinion that these negligence claims against Firestone are

barred under Tennessee law, but hold that they may pursue their claims against Ford[41] under Michigan law.

Under Tennessee law, the economic loss doctrine bars tort claims in which a plaintiff has suffered only economic damages. *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995) ("Tennessee has joined those jurisdictions which hold that product liability claims resulting in pure economic loss can be better resolved on theories other than negligence."). Damage to a defective product itself generally is treated as economic loss not recoverable in tort, but rather "most naturally understood as a warranty claim." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-76 (1986) (noting that "the tort concern with safety is reduced when an injury is only to the product itself," and holding that "no products-liability claim lies in admiralty when the only injury claimed is economic loss," including damage to the defective product itself); *see also Restatement (Third) of Torts: Products Liability* § 21 cmt. d (1997) ("When a product defect results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller. . . . These losses are not recoverable [in a tort action] under the rules of this Restatement."). [42] While

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[41] Only the negligence claims of these three plaintiffs against Ford based upon the damage to their tires survive; as discussed above, no Plaintiff has alleged any damage to his or her Explorer as a result of the Explorer defect, indeed, plaintiff William Wehking owned a Ford pick-up truck, not an Explorer.

[42] The Reporter's Note to comment d of the Restatement discusses this issue at length, noting that:

> A strong majority of courts have taken the position that the key to whether products liability law or commercial law principles should govern depends upon the nature of the loss suffered by the plaintiff. If the plaintiff has suffered loss because the defective product simply malfunctioned or self-destructed, the loss is deemed economic

Plaintiffs assert that other states have held otherwise, especially in contexts in which the defective product poses a safety risk, they have cited no Tennessee case so holding, and our research has disclosed none. Plaintiffs further assert that Tennessee applies the economic loss doctrine only in the commercial context; however, nowhere is that distinction reflected in the relevant Tennessee cases. Accordingly, we conclude that, if faced with the question, the Tennessee Supreme Court, applying the economic loss doctrine, would determine that Tennessee law does not recognize a tort claim in cases in which a defect in a product causes damage only to the product itself. Plaintiffs Simpson, William Wehking, and Wilson may not maintain a negligence action against Firestone, and these claims are hereby **DISMISSED**.

Michigan, on the other hand, has consistently limited its application of the economic loss doctrine to the commercial context. *See, e.g., Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (1992); *Republic Ins. Co. v. Broan Mfg. Co., Inc.*, 960 F. Supp. 1247, 1249 (E.D. Mich. 1997) (Michigan's economic loss doctrine "has no application outside the commercial realm."). Accordingly, Ford's motion to dismiss the negligence claims of Plaintiffs Simpson, William Wehking, and Wilson against it is hereby **DENIED.**

V. Defendants' Additional Arguments for Dismissal of Consumer Protection Claims

Defendants make a number of arguments to support their motion to dismiss the consumer protection claims. These arguments are addressed below.

> loss within the purview of the Uniform Commercial Code (UCC). Similarly, if the plaintiff suffers economic loss not caused by damage to the plaintiff's person or other property, that type of loss is to be governed by the UCC.

Restatement (Third) of Torts: Products Liability § 21, Reporter's Note to cmt. d.

A. No Provisions for Class Action

As noted above, the Master Complaint defines the various proposed classes as "*all persons and entities in the United States* who own or lease . . . vehicles equipped with Firestone-brand . . . tires" and "*all residents of the United States* who purchased, owned, or leased new or used Ford Explorers . . . ." Master Complaint, PP 136, 161 (emphasis added). Defendants correctly note that Plaintiffs cannot maintain a class action under either the TCPA or the MCPA. Reply Brief III at 13-14. By its terms, the TCPA does not provide for class actions. Instead, the statute permits "any person who suffers an ascertainable loss of money or property . . . as a result of the use or employment . . . of an unfair or deceptive act or practice . . . [to] bring an action *individually* to recover actual damages." Tenn. Code Ann. § 47-18-109(a)(1).

The terms of the Michigan consumer protection statute require more complex analysis. The MCPA provides for a "class action on behalf of persons residing or injured in this state . . . ." Mich. Comp. Laws § 445.911(3). Because the statute limits class actions to Michigan residents and injurees, nationwide classes, as Plaintiffs have provisionally defined the classes, are not maintainable. Named Plaintiffs, none of whom are Michigan residents, do not contest that all members of the classes proposed in the Master Complaint were injured either in their home state or in the state where their vehicles and/or tires were purchased or leased. Furthermore, there is no allegation that any named Plaintiff purchased or leased her Explorer in Michigan.

For the above reasons, to the extent that Plaintiffs seek relief against Firestone and Ford "for all others similarly situated," Master Complaint, P 312, Plaintiffs' Tenth Claim for Relief is hereby **DISMISSED**.

While class action suits cannot be brought against either Defendant, Plaintiffs may be able to maintain individual con-

sumer protection claims against Ford and Firestone. In *Nesbitt v. American Community Mutual Ins. Co.*, 600 N.W.2d 427, 433 (Mich. Ct. App. 1999), the Court of Appeals of Michigan permitted a non-resident plaintiff to sue his widow's health insurer because the health-insurer was "a Michigan-licensed company, operating from its home office within this state, engaging in trade or commerce." The named Plaintiffs may be able to prove a set of facts concerning conduct in "trade or commerce" at Ford's Michigan headquarters showing that the "controversy implicates the interests of [Michigan] sufficiently to bring the MCPA to bear." *See* 600 N.W.2d at 433.

Likewise, in *Steed Realty v. Oveisi*, 823 S.W.2d 195, 198 (Tenn. Ct. App. 1991), the Court of Appeals of Tennessee permitted out-of-state residents to bring a claim under the TCPA concerning out-of-state real estate purchases. The court found that it had jurisdiction because the defendant "advertised through both press and broadcast media in Tennessee, . . . held the real estate closings in Tennessee, and . . . transacted business from his office in Tennessee." *Id.* Plaintiffs have alleged that Firestone advertises in Tennessee and that Firestone conducts business from its offices there. Firestone, however, argues that the TCPA cannot "be applied . . . to named [plaintiffs] outside of Tennessee who have had no dealings with Firestone in Tennessee" because the *Steed* court found jurisdiction over the out-of-state plaintiff only because he closed the challenged real estate transaction at the defendant's office in Tennessee. Reply Brief III at 15 n. 12. It is not clear from the opinion in *Steed* that the factor noted by Firestone was decisive. In addition, the Court of Appeals was addressing subject matter jurisdiction specifically. Here, we are concerned with whether the TCPA regulates the conduct of Tennessee businesses, regardless of where the court enforcing the TCPA sits or the plaintiffs reside. Firestone's argument is not convincing on this point. Therefore, the

named Plaintiffs may have individual claims under the TCPA and the MCPA.

B. Purchase or Lease for Personal Use

Because out-of-state individuals can bring claims against Ford and Firestone under the MCPA and the TCPA, respectively, we address the remainder of Defendants' arguments for dismissing Plaintiffs' consumer protection claims. With respect to the MCPA,[43] Ford maintains that named Plaintiffs failed to alleged that they "purchased" or "leased" their vehicles or tires. Brief III at 4. The MCPA requires that the alleged deceptive or unfair act or practice occur in the "conduct of trade or commerce." Mich. Comp. Laws § 445.903(a)(1). "'Trade or commerce' means the conduct of a business providing goods . . . [for] sale [or] lease." Mich. Comp. Laws § 445.902(d). The Court finds that Plaintiffs satisfy the pleading requirements set forth by these two provisions of the MCPA. We note that for a number of Plaintiffs, the Master Complaint uses the magic words deemed necessary by Ford. *See, e.g.*, Master Complaint, P 16 ("Plaintiff Eberly *leases* a 2000 Ford Explorer equipped with Firestone Wilderness AT P235/70R15 Tires.") (emphasis added). Furthermore, the remainder of Plaintiffs are alleged to "have" or to "own" Explorers. *See, e.g., id.* at P 19 ("Plaintiff Moran *owns* a Ford Explorer with Firestone Wilderness AT Tires.") (emphasis added). Under Rule 12(b)(6), dismissal is appropriate only if it appears to a certainty that the plaintiff cannot establish any set of facts which would entitle him to the relief sought. *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). A plaintiff is also entitled to all reasonable inferences to be drawn from the factual allegations in the complaint. *Holman*, 211

[43] The TCPA is more broadly worded than the MCPA. Defendants' arguments in this section are not relevant to Plaintiffs' claims against Firestone under the Tennessee consumer protection statute.

F.3d at 402. The named Plaintiffs who allege ownership of Explorers likely may be able to establish, consistent with ownership, that they purchased their vehicles, rather than, for example, that they received them as gifts from benevolent relatives. Indeed, the former scenario certainly is a more reasonable inference than the latter possibility.

Similar reasoning disposes of Ford's argument that the elements of an MCPA claim are not pled because Plaintiffs failed to allege purchase or lease of the vehicles "primarily for personal, family, or household purposes" as required by Mich. Comp. Laws § 445.902(d). Reply Brief III at 14. The typical allegation about the named Plaintiffs is as follows: "Plaintiff Cheryl Stuart resides in Charleston, West Virginia, and is a citizen of the State of West Virginia. Plaintiff Stuart owns a 1998 Ford Explorer that was equipped with Wilderness AT Tires." Master Complaint, P 28. None of the named Plaintiffs alleges that he or she is a business or uses the vehicles or tires for business purposes. While some Plaintiffs may use their vehicles primarily for non-household purposes, a "set of facts could be proved consistent with the allegations" that would state a claim under the MCPA by establishing personal use of the Explorers. *Hrubec*, 981 F.2d at 963. Under the system of notice pleading established by Federal Rule of Civil Procedure 8, such specificity is not required at this stage of the proceedings. Because we are addressing a motion to dismiss, Defendant's objection to the complaint on this ground is premature.

C. Pleading Fraud with Particularity

Defendants contend that Plaintiffs' claims under the state consumer protection statutes must be dismissed because they failed to plead their fraud-based claims with particularity. Brief III at 2. Because "the great majority of the specific practices enumerated in the [MCPA]--including those relied upon by [Plaintiffs]--involve fraud," *Mayhall*, 341 N.W.2d at 270, Plaintiffs' pleadings regarding these practices are sub-

ject to the requirements of Federal Rule of Civil Procedure 9(b).[44] Hence, "the circumstances constituting fraud or mistake [must] be stated with particularity." Fed. R. Civ. P. 9(b). Because this is a diversity suit in federal court, the standard for pleading requirements under Rule 9(b) is set by the Seventh Circuit. *See Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001).

Applying this standard is complicated because the elements that must be pled with particularity depend on the elements of the underlying substantive statute, which here are the TCPA and the MCPA. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079 (7th Cir. 1997) (holding that although pleading fraud under Rule 9(b) normally requires providing the "who, what, when, where, and how" of specific misrepresentations, certain details are not needed in a suit for constructive fraud because elements of constructive fraud exclude specific misrepresentation). Not surprisingly, there are no cases applying the Seventh Circuit's interpretation of Rule 9(b) to the TCPA or the MCPA. There is, however, one federal court in Michigan that considered the MCPA under Rule 9(b) as interpreted by the Sixth Circuit. In *Platsis v. E.F. Hutton & Co.*, 1985 U.S. Dist. LEXIS 23492, 1985 WL 447, at *3 (W.D. Mich. Jan. 11, 1985), the court found a complaint under the MCPA sufficient because "it alleged the time, place and contents of the

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[44] For instance, Plaintiffs allege that "Ford violated state consumer protection statutes when they falsely represented that the . . . Explorers were of a particular standard or quality when they were not." Master Complaint, P 308; see Mich. Comp. Laws § 445.903(1)(e) ("Representing that goods or services are of a particular standard, quality, or grade . . . if they are of another [is unlawful.]"); Tenn. Code Ann. § 47-18-104(b)(7) ("Representing that goods or services are of a particular standard, quality or grade . . . if they are of another [is prohibited.]"). As the court in *Mayhall* correctly noted, such an allegation concerns fraudulent conduct. 341 N.W.2d at 270 (citing Mich. Comp. Law 445.903(1)(e) and other sections as examples of prohibited practices involving fraud).

misrepresentation, the identity of the person making the misrepresentation, and the consequences of the misrepresentation." This standard is similar to the requirement in the Seventh Circuit that the plaintiff allege the "who, what, when, where, and how" of the fraud. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Both precedents will guide our inquiry into whether Plaintiffs state their consumer protection claims with the requisite particularity.[45]

Contrary to Ford's contention, with one potentially correctable exception, Plaintiffs plead with particularity the "circumstances constituting fraud." Plaintiffs list a number of advertisements for Ford Explorers. Master Complaint, P 124(a)-(m). Plaintiffs' allegations generally include a quote from the advertisement, the date the advertisement was issued, and the place of publication. *See, e.g., id.* at P 124(a) ("In an advertisement in the December 31, 1999 issue of *People* magazine, the Explorer was advertised as "'providing exceptional control.'") (alteration in original). Ford does not argue that it did not make these representations or that some other entity was responsible for placing the advertisements. Instead, Defendant suggests that such statements are "mere statements of opinion and thus do not rise to the level of fraud or fraudulent misrepresentation." Reply Brief III at 15 n.14. However, Plaintiffs allege that "the Explorer . . . [has] significant handling and stability defects." Master Complaint, P64. If Plaintiffs can establish facts consistent with that allegation, then the statement that the Explorer provides "exceptional control" could be a misrepresentation.

"The consequences of the misrepresentation" refer to reliance and injury. The issue of loss was decided in favor of Plaintiffs in the above discussion on injury as it relates to all of Plaintiffs' claims and will not be repeated here. Plaintiffs

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[45] Our research revealed no cases applying Rule 9(b) pleading requirements to the TCPA.

allege reliance generally, claiming that "this recently discovered decade-long and continuing pattern of deceit led millions of consumers to purchase or lease Ford Explorers at prices far in excess of the values which would have been assigned to such vehicles had these dangers been disclosed." Master Complaint, P6. In a class action, this allegation would likely suffice. In *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), the Supreme Court of Michigan held "that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations [as long as]. . . the class can establish that a reasonable person would have relied on the representations."

As discussed above, Plaintiffs here cannot bring a class action under the MCPA on behalf of a nationwide class. Therefore, they are subject to a higher pleading requirement than that set forth in *Dix*. Various Michigan cases have required plaintiffs to show that the allegedly false representation made by the defendant influenced their decision to enter into the contested transaction. In *Mayhall*, 341 N.W.2d, the court characterized loss under the MCPA as the frustration of expectations brought about through reliance on defendant's false representations. The court in *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999), looked at the materiality of the defendant's representation in order to determine whether the plaintiff had an MCPA claim because one element of fraud is materiality. The *Zine* court determined that "a material fact for purposes of the MCPA would likewise be one that is important to the transaction *or affects the consumer's decision* to enter into the transaction." *Id.* (emphasis added). Furthermore, the language of the MCPA itself requires a causal link between the alleged misrepresentation or omission and the injury. Mich. Comp. Law § 445.911(2) ("a person who suffers a loss *as a result of a violation* of this act may bring an action to recover actual dam-

ages or $ 250.00, whichever is greater . . .") (emphasis added).

One Tennessee case, *Ganzevoort v. Russell*, 1995 Tenn. App. LEXIS 692, 1995 WL 623047, at *2-3 (Tenn. Ct. App. Oct. 25, 1995), concludes that the TCPA does not require plaintiffs to prove reliance. However, this same case dismisses the plaintiff's claim because the record did not indicate "how the deceptive act affected the [contested] trade." *Id.* at *2. The court reasoned that the deceptive act occurred only after the plaintiff had closed the transaction and that, therefore, the deceptive act could not have caused the plaintiff to enter into the transaction. Because we find the court's statement on reliance confusing in light of its reasoning and, ultimately, unconvincing, we shall rely on the statutory language. The TCPA uses "linking" language similar to that in the MCPA. It permits "any person who suffers an ascertainable loss . . . *as a result of the use or employment by another person of an unfair or deceptive act* . . . [to] bring an action . . ." Tenn. Code. Ann. § 47-18-109(a)(3). We conclude that if the Supreme Court of Tennessee were applying this language to the situation before us, it would reach a conclusion similar to that reached by the Michigan courts interpreting the MCPA.

Plaintiffs allege that Ford made various misrepresentations and omissions regarding the quality of Explorers. *E.g.*, Master Complaint, P 308 ("[Defendants] concealed and suppressed facts material to the true characteristics, standards, and quality of these products."). For Plaintiffs to show that they suffered a loss as a result of a violation of one of the sections of the MCPA or the TCPA concerning misrepresentations and omissions, they must also establish that they took the allegedly false statements into account when making their decision to lease or purchase Explorers. Should the named Plaintiffs wish to prosecute their suits under the TCPA and MCPA individually, they shall be granted leave

to amend the complaint in order to allege individual reliance. Therefore, Plaintiffs' Claims under the TCPA and the MCPA are hereby **DISMISSED** and Plaintiffs are **GRANTED** leave to amend the Master Complaint as discussed above.

VI. Defendants' Additional Arguments for Dismissal of Express and Implied Warranty Claims

A. Notice of Breach

U.C.C. § 2-607(3)(a)[46] provides: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Defendants argue that "because Plaintiffs have not alleged that they provided the requisite notice under § 2-607, their breach of warranty claims must be dismissed." Brief III at 41.

Courts vary widely in their interpretations of § 2-607(3)(a). For example, some courts have held, with varying degrees of analysis, that the filing of a lawsuit can, at least in some instances, satisfy the notice of breach requirement. *See, e.g., In Re Latex Gloves Prods. Liab. Lit.*, 134 F. Supp. 2d 415, 422-23 (E.D. Pa. 2001); *Panda Capital Corp. v. Kopo Int'l, Inc.*, 662 N.Y.S.2d 584, 586 (1997); *Mullins v. Wyatt*, 887 S.W.2d 356, 358 (Ky. 1994); *Hudson v. Gaines*, 403 S.E.2d 852, 854 (Ga. Ct. App. 1991); *Chemtrol Adhesives, Inc. v. American Mfgs. Mutual Ins. Co.*, 537 N.E.2d 624, 638 (Ohio 1989); *Shooshanian v. Wagner*, 672 P.2d 455, 463 (Alaska 1983). Other courts have reached the opposite conclusion. *See, e.g., Brookings Municipal Utilities, Inc. v. Amoco Chem. Co.*, 103 F. Supp. 2d 1169, 1176 (D.S.D. 2000) (citing *Hepper v. Triple U Enterprises, Inc.*, 388 N.W.2d 525, 529 (S.D. 1986)); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 590 (Ill. 1996) (holding that under

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[46] Mich. Comp. Laws § 440.2607(3)(a); Tenn. Code Ann. § 47-2-607(3)(a).

Illinois law only a consumer buyer who suffered a personal injury may satisfy § 2-607 by filing suit); *Lynx, Inc. v. Ordnance Prods., Inc.*, 327 A.2d 502, 513-14 (Md. 1974). The parties have not cited any case in which a Tennessee or Michigan court has addressed this issue, and our own research has unearthed none. Therefore, we must determine into which camp the Tennessee and Michigan Supreme Courts would fall if confronted with this issue.

In our view, the more well-reasoned cases are those that hold that the filing of a complaint may be sufficient to satisfy the notice of breach requirement of § 2-607 under certain circumstances. While Defendants refer to § 2-607(3)(a) as establishing a "pre-litigation notice" requirement, the plain language of the statute does not require that notice be given prior to filing suit, only that notice be given within a reasonable time. Neither are the main policies behind the notice of breach requirement--protecting defendants from stale claims, "opening the way for normal settlement through negotiation" (Comment 4 to U.C.C. § 2-607), and giving the defendant the opportunity to correct any defect--necessarily frustrated if notice is given by filing suit. Obviously, the first policy is promoted equally whether early notice is given by informal letter or the filing of a lawsuit. As to the policy of promoting settlement, we do not believe that filing suit is an impediment to successful settlement negotiations. "To the contrary, the prospect of going to trial is often a powerful incentive to a defendant to investigate the claims against it and to arrive at a reasonable agreement." *Shooshanian*, 672 P.2d at 462-63. Finally, in cases such as this one (assuming, as we must, that the facts as pled are true), where Defendants had ample notice of the defect in the products[47] well before the lawsuit

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[47] Defendants, citing to *Connick*, 675 N.E.2d at 590, point out the important distinction between notice of problems with a product in general (in *Connick*, "safety concerns regarding the Samurai") and notice of trouble "with the particular product purchased by a particular buyer." However, in this case Plaintiffs allege in the Master Complaint that *all* of

was filed, and, indeed, allegedly well before Plaintiffs themselves did, and chose not to remedy those defects, no purpose would be served by requiring pre-litigation notice.[48] Therefore, we conclude that a per se rule that the filing of a lawsuit can never satisfy the notice of breach requirement would be improper, and we find nothing in either Michigan or Tennessee law suggesting that the Supreme Courts of those states would not also so hold.[49] Whether § 2-607(3)(a) was satisfied in this case involves the resolution of questions of fact; however, it is clear that there are facts consistent with the Master Complaint that, if ultimately proven, will support a finding that the Plaintiffs provided the requisite notice of breach to the Defendants by filing suit. Accord-

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the Tires and Explorers are defective and that Defendants were aware of that fact well before Plaintiffs filed suit, and at this stage these allegations must be accepted as true.

[48] The Court recognizes that there is split authority on the issue of whether actual notice of defendants of problems with a product is sufficient to satisfy § 2-607. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* 611 n. 1 (4th Ed. 1995) (collecting cases and noting that "the majority of cases find actual notice to suffice . . . but several cases . . . require more than actual notice"). Thus, whether a defendant had actual notice before the plaintiff filed suit is one factor which should be considered in determining whether the lawsuit was adequate notice in a given case, regardless of whether actual notice by itself is sufficient to constitute notice.

[49] Indeed, we found two cases from Tennessee involving other notice provisions that lend some support to this determination. In *Moon v. Auto-Owners Ins. Co.*, 736 S.W.2d 92, 94 (Tenn. 1987), the court addressed the issue of whether the filing of a lawsuit satisfied Tenn. Code Ann. § 50-6-201, which provides, in relevant part, that "no [worker's compensation benefits] shall be payable under the provisions of this chapter unless . . . written notice is given the employer within thirty (30) days after the occurrence of the accident." The court held that it did. *Id.* Similarly, in *Wal-Board Supply Co., Inc. v. Daniels*, 629 S.W.2d 686, 688 (Tenn. App. 1981), the court held that the requirement in a bond that "notice of claims must be given" within a certain time period was satisfied when the plaintiff filed suit within that time period.

ingly, the Plaintiffs' claims will not be dismissed on the basis that they did not satisfy § 2-607(3)(a).

B. Statute of Limitations

Defendants assert that under the applicable statute of limitation, the breach of express and implied warranty claims of Plaintiffs Richard Glover, Allan Simpson, Jane Lill,[50] Susan Grayson, Dawn Whorl, and John Dovich are time barred. Plaintiffs argue, and Defendants do not dispute, that under Indiana's choice of law rules, Indiana's statutes of limitations apply to all of the state law claims in this case. *See Singletary v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1242 (7th Cir. 1993) (citations omitted) ("For purposes of choice of law statutes of limitations are treated as procedural rules . . . so the forum state . . . can and does supply the complete statute of limitations for use in this case . . . ."); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1385 (S.D. Ind. 1989) (citations omitted) ("Because in Indiana statutes of limitations are procedural in nature, Indiana choice-of-law rules state that the statute of limitations of the forum state, Indiana, will apply."), aff'd, 917 F.2d 278 (7th Cir. 1990); *but see Jean v. Dugan*, 20 F.3d 255, 259 (7th Cir. 1994) (treating statute of limitations as substantive for choice of law purposes).

The statute of limitations for a breach of warranty action in Indiana is four years. Ind. Code § 26-1-2-725(1).[51] As noted above, a breach of warranty cause of action accrues when tender of delivery is made. Ind. Code § 26-1-2-725(2). Defendants assert that because each of the six Plaintiffs

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[50] Defendants further allege in a footnote that these three Plaintiffs' unjust enrichment claims also are barred by Florida's four-year statute of limitations for such claims. Brief III at 69 n. 65.

[51] The identical statute is found in Michigan, Mich. Comp. Laws § 440.2725(1), and Tennessee, Tenn. Code Ann. § 47-2-725(1).

listed above owned or owns a model-year 1995 or earlier Explorer, and each filed suit in 2000, each failed to file his or her claim within the four-year limitation period, and therefore those warranty claims are time barred.[52]

Plaintiffs counter that the statute of limitations was tolled due to Defendants' fraudulent concealment of the defects in the Tires and the Explorers.[53] Defendants argue that Plaintiffs have failed in two distinct ways to plead the facts necessary to support a finding of fraudulent concealment:[54] first, they have not alleged that Plaintiffs exercised reasonable care and due diligence in detecting the fraud; and second, they have not alleged that Defendants actively concealed the defects, rather than simply failed to disclose them.[55] Plaintiffs were not required to plead with such specificity under the Federal Rules of Civil Procedure, however. *See Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 419 (7th Cir. 1998). Instead, a complaint need only give the defendant "at least minimal notice of the claim." *Id.* (citing Fed. R. Civ. P.

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[52] For purposes of this discussion only, we accept Defendants' implicit assertion that the model year represents the latest point at which Plaintiffs purchased their Explorers, although that may not be accurate.

[53] Indiana Code § 34-11-5-1 codifies the doctrine of equitable tolling because of fraudulent concealment: "If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action."

[54] The Court at this point offers no opinion on whether Defendants' representation of Indiana law respecting fraudulent concealment is correct, as it is not necessary to do so to resolve the instant motion.

[55] We note that Plaintiffs do plead at least one specific instance of active concealment by Ford when, in P 93 of the Master Complaint, they allege that Ford "deceptively labeled its Venezuela recall a 'customer notification enhancement action' rather than acknowledging that it was actually recalling tires it knew had the potential for sudden and catastrophic failure" in order to prevent United States Explorer owners from learning of the problems with the Tires.

8(a)(2) and *Jackson v. Marion County*, 66 F.3d 151, 154 (7th Cir.1995)). Indeed, as noted above, to succeed on a motion to dismiss, a defendant must show that there is no set of facts consistent with the plaintiffs' allegations that would entitle the plaintiff to relief. *Id.*; *Holman*, 211 F.3d at 402. Whether or not the facts contained in the Master Complaint would, by themselves, support a finding of fraudulent concealment is irrelevant; the relevant question is whether there is any set of facts consistent with the Master Complaint that will support such a finding if Plaintiffs ultimately can prove them. The answer to that question is undeniably yes; accordingly, Plaintiffs' warranty claims will not be dismissed based upon the statute of limitations contentions.

VII. Defendants' Additional Arguments for Dismissal of Breach of Implied Warranty of Merchantability Claims

Defendants argue that Plaintiffs have failed to plead properly their claims for breach of the implied warranty of merchantability for several reasons, each of which is addressed below.

A. Plaintiffs' Failure to Allege Vertical Privity

Defendants argue that Plaintiffs' implied warranty claims must be dismissed because the Master Complaint does not allege that each Plaintiff was in vertical privity with the Defendants. Specifically, Defendants object to the fact that Plaintiffs "do not allege that they purchased or leased their vehicles and tires directly from Ford or Firestone; nor do they allege that they acquired their vehicles or tires from dealers, let alone that the dealers were agents of Ford or Firestone." Reply Brief III at 23-24. Again, however, Plaintiffs were not required to include such allegations in their complaint under our notice pleading system. *See Kaplan*, 153 F.3d at 419. Therefore, the court in *Kaplan* held that "the fact that [the plaintiff] did not plead facts showing that

he was in privity with [the defendant] . . . [did not] bar his claim as a matter of law; as long as he put [the defendant] on notice of the nature of his claim, his case can proceed." *Id.* Here Defendants certainly cannot in good faith argue that the Master Complaint does not put them on notice of the nature of Plaintiffs' claims against them. Further, there obviously are facts consistent with the allegations in the Master Complaint that Plaintiffs can endeavor to prove which will satisfy the privity requirement. Accordingly, the implied warranty claims in the Master Complaint will not be dismissed for failure to plead vertical privity.

B. Durational Limits of Implied Warranty Obligations

In P 205 of the Master Complaint, Plaintiffs assert:

> Any limitations periods, limitations on recovery, or exclusion of implied warranties in [Defendants'] express warranty are unconscionable within the meaning of section 2-302[56] of the Uniform Commercial Code, and therefore are unenforceable, in that, among other things, the Tires and Explorers contain latent defects of which [Defendants] were aware at the time of sale, and buyers lacked a meaningful choice with respect to the terms of the express written warranties due to unequal bargaining power and a lack of warranty competition among dominant tire and automobile manufacturers.

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[56] U.C.C. Section 2-302(1) (Mich. Comp. Laws § 440.2302(1); Tenn. Code Ann. § 47-2-302(1)) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

In their motion to dismiss, Defendants dispute the accuracy of this assertion, arguing that the durational limits are enforceable because they comply with U.C.C. § 2-316 and, according to a leading U.C.C. treatise, there are "no cases that find a disclaimer conforming to 2-316 to be unconscionable." Brief III at 54 (quoting James J. White & Robert S. Summers, *Uniform Commercial Code* 675 (4th Ed. 1995)).[57] The Court assumes that Defendants believe that some or all of Plaintiffs' breach of implied warranty claims are barred by the durational limits contained in Defendants' express warranties. However, Defendants do not make this argument explicitly in their motion to dismiss, perhaps because the Master Complaint--quite understandably--does not contain all of the facts necessary to determine which Plaintiffs fall into that category. Rather, Defendants simply argue that Plaintiffs' assertion of unconscionability "must fail." Brief III at 55. While Defendants' argument raises several interesting legal issues that likely will ultimately need to be resolved, the Court cannot resolve them in the vacuum in which they have been presented. Paragraph 205 by itself does not purport to assert a claim for relief, and therefore is not the proper subject of a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state such a claim. Further, even if Defendants had raised the issue of the enforceability of the durational limits in the proper context, as a defense to

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[57] U.C.C. § 2-316(2) (Mich. Comp. Laws § 440.2316(2); Tenn. Code Ann. § 47-2-316(2)) sets forth the requirements which must be satisfied for an exclusion or modification of the implied warranty of merchantability to be enforceable. Courts and commentators alike have struggled with the intricacies of this and other U.C.C. provisions related to warranty disclaimers and unconscionability. Indeed, the two authors of the treatise cited by Defendants, Professor Summers and Professor White, disagree with one another as to some of the finer points. *See* White & Summers, *supra*, at 677 ("One of us believes that these courts misread the intention of the drafters and that the drafters never intended 2-302 to be an overlay on the disclaimer provisions of 2-316."). We view it as neither necessary nor prudent for us to weigh in on these issues at this point.

certain Plaintiffs' implied warranty claims, U.C.C. § 2-302(2)[58] provides that "when it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." Therefore, we regard it as inappropriate to attempt to resolve the issue of unconscionability on the pleadings alone. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989) (holding that it was error to determine that durational limitations were reasonable and conscionable based solely on the pleadings and that the court "will be equipped to address that question only *after* plaintiffs have had an opportunity--whether in connection with a motion for summary judgment or at trial--to present evidence that, for example, they had no 'meaningful choice' but to accept the limited warranties, or that the durational limitations 'unreasonably' favored the defendant"). Accordingly, Defendants' motion to dismiss Plaintiffs' claims for breach of implied warranty is hereby **DENIED**.

VIII. Defendants' Additional Arguments for Dismissal of Express Warranty Claims

In the Master Complaint, Plaintiffs allege that Defendants "expressly warranted the Tires and Explorers to be free of defects at the time of delivery" and that Defendants breached those warranties by selling defective Tires and Explorers. Master Complaint, PP 314-15. Ford provides a written warranty along with each new Explorer that it sells, in which it warrants that its dealers will "repair, replace or adjust all parts (except tires) . . . that are defective in factory-supplied materials or workmanship for 3 years or 36,000

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[58] Mich. Comp. Laws § 440.2302(2); Tenn. Code Ann. § 47-2-302(2).

miles (whichever occurs first)."[59] Ford asserts that because "no named Plaintiff alleges that he or she ever presented a covered vehicle to an authorized Ford dealer for warranty repair within the warranty period and was denied service," Brief III at 37, no Plaintiff asserts a valid claim for breach of Ford's written warranty. Similarly, Firestone's written warranty provides that it will replace any warranted tire that has "become unusable for any reason within the manufacturer's control" as long as the tire has not worn down to 2/32nds of an inch of tread depth. Firestone argues that none of the named Plaintiffs alleges that "he or she satisfied the minimum preconditions for obtaining a replacement tire under Firestone's warranty," and therefore each has failed to state a claim for breach of written warranty. These arguments made as part of a motion to dismiss are without merit, inasmuch as under the Federal Rules, Plaintiffs were not required to include such specific factual allegations in their complaint. Whether Plaintiffs satisfied any obligations they may have had under Defendants' written warranties is a factual question that is not properly addressed by a motion to dismiss premised, as it is, on a lack of factual detail. Further, Plaintiffs argue that Defendants' limitations of remedies in their written warranties fail of their essential purpose, and therefore their remedies for breach of warranty are not limited to repair or replacement;[60] this, too, raises factual issues that must be resolved in a context other than a motion to dismiss.

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[59] Because Plaintiffs did not attach copies of the relevant Ford written warranties to the Master Complaint, Ford quite properly submitted them with its motion to dismiss. The precise language of the warranties varies slightly between model years, but the substance is the same.

[60] U.C.C. § 2-719(2) (Mich. Comp. Laws § 440.2719(2); Tenn. Code Ann. § 47-2719(2)) provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided [in other provisions of the U.C.C.]." Plaintiffs argue that the Defendants' remedies have failed of their essential purpose because (1) Ford's promise to repair or replace any defective part of the Explorer is

In addition to the written warranties provided by Defendants, Plaintiffs also allege that Defendants expressly warranted the Explorers and the Tires to be tough and rugged by describing the Explorer as a "sport utility vehicle," and giving the Tires names such as AT ("all terrain") and "Wilderness," and that Defendants breached these "core description warranties" when they sold defective tires and vehicles that were anything but tough and rugged. We agree with Defendants that these descriptions alone, as a matter of law, are not sufficient to create any express warranty regarding the safety or performance of the Tires and the Explorer. However, Plaintiffs also allege that each Defendant created an express warranty regarding its product's safety with statements it made in its advertising campaigns. Defendants do not argue that an advertising campaign, as a matter of law, can never create an express warranty;[61] rather, they argue that the particular advertising statements identified in the Master Complaint do not constitute warranties. Whether Defendants' advertisements contained statements sufficient to create an express warranty, whether any such warranty was the basis of the bargain between any given Plaintiff and Defendant(s), and whether Defendant(s) breached any such warranty are all

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worthless because the Explorer's defect cannot be corrected by repairing or replacing any defective part; and (2) Firestone has refused to replace some of the defective tires, and in instances where it has replaced tires it has used equally defective replacement tires.

[61] Presumably that is because it is clear that under some circumstances warranties can be created through advertising. *See Triple E, Inc. v. Hendrix & Dail, Inc.*, 543 S.E.2d 245, 247 (S.C. App. 2001) (citing: *Gherna v. Ford Motor Co.*, 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); *Torres v. Northwest Engineering Co.*, 949 P.2d 1004 (Haw. 1997); *Scheuler v. Aamco Transmissions, Inc.*,, 571 P.2d 48 (Kan. 1977); *Courtney v. Bassano*, 733 A.2d 973 (Me.1999); *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. App.1976); *Daughtrey v. Ashe*, 413 S.E.2d 336 (Va. 1992); *Arrow Transp. Co. v. A.O. Smith Co.*, 454 P.2d 387 (Wash. 1969)); *see also* White & Summers, *supra*, at 494-95 (collecting cases that have so held).

questions of fact that cannot be resolved by a motion to dismiss. Accordingly, Defendants' motion to dismiss Plaintiffs' claims for breach of express warranty is hereby **DENIED**.

IX. Defendants' Additional Arguments for Dismissal of Magnuson-Moss Warranty Act Claims

Because Plaintiffs' claims under the Magnuson-Moss Warranty Act are derivative of their state law warranty claims, Defendants argue that the Magnuson-Moss claims must be dismissed for the same reasons as the state law claims. Accordingly, since the motion to dismiss the state law warranty claims is denied, the motion to dismiss the Magnuson-Moss Act claims must also be and is hereby **DENIED.**

X. Defendants' Additional Arguments for Dismissal of Unjust Enrichment Claims

As noted above, Plaintiffs allege that Defendants have been unjustly enriched by selling them defective Explorers and Tires for the price of non-defective Explorers and Tires. Defendants move to dismiss Plaintiffs' unjust enrichment claim on the ground that Plaintiffs also have alleged that written contracts (in the form of written warranties) existed between the parties, and unjust enrichment is a quasi-contractual remedy which may only be invoked in the absence of an express contract. Plaintiffs counter that they are permitted under Federal Rule of Civil Procedure 8(e)(2) to allege alternative inconsistent theories in their complaint. Rule 8(e)(2) provides:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is

> not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Defendants correctly point out that the Master Complaint does not set out explicitly the alternative nature of the claims for breach of express warranty and unjust enrichment, but such is not required under Rule 8. A complaint "need not use particular words to plead in the alternative, [but] must use a formulation from which it can be reasonably inferred" that theories are intended as alternatives. *See Holman*, 211 F.3d at 407. There is nothing unreasonable about such an inference in this case. Therefore, while we agree that the Master Complaint could have been more artfully drafted to expressly plead the two claims in the alternative, we will not dismiss the unjust enrichment claim for such a failure to do so.

Defendants also attack Plaintiffs' unjust enrichment claim on the merits. As set forth above, under both Michigan and Tennessee law, in order to state a claim for unjust enrichment, Plaintiffs must prove that Defendants have received and retained a benefit from Plaintiffs. Defendants argue that, as to all of the Tires that have been recalled, Plaintiffs have failed to allege, and cannot prove, that Defendants have retained any benefit because Defendants have replaced the Tires at considerable cost to them. However, Plaintiffs allege that some or all of the replacement tires offered during the recall suffer from the same defect. Whether this is true, and whether any actions taken by Defendants have divested them of any benefit they received from Plaintiffs from the sale of allegedly defective products, are questions of fact that cannot be resolved at this time or in this context. Because there is at least one set of facts, consistent with the Master

Complaint, which, if proven, would support Plaintiffs' unjust enrichment claim, that claim is not subject to dismissal, and Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is hereby **DENIED**.[62]

CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendants' Motion to Dismiss Plaintiffs' First, Ninth, Eleventh, and Twelfth Claims for Relief. The Court further **GRANTS** Defendants' Motion to Dismiss Plaintiffs' Second through Seventh, Thirteenth, and Fourteenth Claims for Relief. Plaintiffs' Tenth Claim for Relief is **DISMISSED** only to the extent set forth more specifically above.

It is so ORDERED this 27th day of July 2001.

SARAH EVANS BARKER, JUDGE

United States District Court

Southern District of Indiana

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[62] Defendants assert an additional ground for dismissal under Arizona, Florida, Illinois, Louisiana, and Ohio law which the Court need not address.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. PRODUCTS LIABILITY LITIGATION ATX, ATX II AND WILDERNESS TIRES	Master File No. IP 00-9373-C-B/S MDL No. 1373 (Centralized Before Judge Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

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CERTIFICATE OF SERVICE

Service of the foregoing was made by hand delivery or by placing a copy of the same into the United States Mail, first class postage prepaid, this 26th day of July, 2001, addressed to all counsel of record appearing on the Panel Attorney Service List, and others, as necessary.

/s/

NEGLIGENCE
A. VARIATIONS IN ECONOMIC LOSS DOCTRINE
1. **Examples Of States In Which The Economic Loss Doctrine Acts As An Outright Bar To Plaintiffs' Negligence Claims**
Alabama – *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 672 (Ala. 1989) (holding that economic loss doctrine bars tort claim seeking recovery of repair costs for defective front-end loader)
California – *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965) (barring strict liability claim seeking repair costs where alleged defect resulted in damage only to the allegedly defective product itself); *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 44 Cal. Rptr. 2d 305, 314 (Cal. Ct. App. 1995) (under California law, economic loss doctrine bars claims for damage "that occurs through loss of value or use of the goods sold or the cost of repair . . . when there has been no claim of personal injury or damage to other property")
Florida – *Florida Power & Light Co. v. Westinghouse Elec. Co.*, 510 So. 2d 899, 900 (Fla. 1987) (Florida law precludes recovery of purely economic losses in tort)
Indiana – *Prairie Prod., Inc. v. Agchem Div.–Pennwalt Corp.*, 514 N.E.2d 1299, 1304 (Ind. Ct. App. 1987) (noting that a "manufacturer does not owe a duty to avoid causing purely economic damage")
Michigan – *Neibarger v. Universal Coops, Inc.*, 486 N.W.2d 612, 617 (Mich. 1992) (noting that " 'when a plaintiff seeks to impose liability for economic losses only, tort law concerns with product safety no longer apply, and commercial law concerns with economic expectations must govern' ") (citations omitted)
Minnesota – *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992) (en banc) ("an action for damage to the defective product itself is always limited to a UCC based recovery"); *Transp. Corp. of Am., Inc. v. IBM*, 30 F.3d 953, 956 (8th Cir. 1994) ("[t]he economic loss doctrine in Minnesota bars recovery under the tort theories of negligence or strict liability for economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property")
New York – *Bocre Leasing Corp. v. Gen. Motors Corp.*, 645 N.E.2d 1195, 1196 (N.Y. 1995) (economic loss doctrine barred negligence claims for "minor property damage to the helicopter itself, with no damage whatsoever to persons or other property")

North Dakota – *Coop. Power Ass'n v. Westinghouse Elec. Corp.*, 493 N.W.2d 661, 663 n.5 (N.D. 1992) (economic loss doctrine bars negligence claims where "there has been no claim of personal injury or damage to other property") (citations omitted)
Pennsylvania – *REM Coal Co. v. Clark Equip. Co.*, 563 A.2d 128, 129 (Pa. Super. Ct. 1989) (denying "recovery in tort where a product malfunctions because of an alleged defect in the product")
South Carolina – *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*, 374 S.E.2d 897, 902 (S.C. Ct. App. 1988) (barring tort recovery for allegedly defective building construction on econonic loss doctrine grounds)
Texas – *Jim Walters Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (barring negligence claims)
2. Examples Of States That Permit Non–Incident Owners To Sue In Negligence Upon A Showing That The Allegedly Defective Tire Or Vehicle Creates A Grave Risk To Other Property Or To Personal Safety
Alaska – *N. Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 326 (Alaska 1981) (damage caused by a product defect to the product itself would be recoverable if the defect posed an inchoate safety risk)
Arizona – *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 210 (Ariz. 1984) (where defect makes product unreasonably dangerous to people or property, damage to defective product itself may be recoverable)
Illinois – *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 449-50 (Ill. 1982) (economic loss doctrine bars negligence claims unless the product defect at issue poses a "sudden and dangerous," if inchoate, safety risk)
Maryland – *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. App. 1995)(where defendant's negligence creates serious risk of injury from product's dangerous condition, tort recovery of economic loss allowed)
Oregon – *Gladhart v. Oregon Vineyard Supply Co.*, 994 P.2d 134, 142-43 (Or. Ct. App. 1999) (permitting actionable tort where product defect results in unreasonable danger to persons or property)
Washington – The Washington Product Liability Act ("WPLA"), Wash. Rev. Code § 7.72.010(4) (2000), preempts the common law actions of strict liability and negligence. Under the WPLA, no recovery for purely economic loss is available. *See Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199, 1207 (Wash. 1989). However, damage caused to the allegedly defective product itself by an alleged defect that poses a safety risk, even if inchoate, is not considered an "economic loss" under the WPLA and may be recovered under the statute. *See id.* at 1209; *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284, 1291 (Wash. 1987).

B. VARIATIONS IN NEGLIGENCE STANDARDS
1. Examples Of State Variations In Test For Defective Design
a. Consumer Expectations Test
Indiana – *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995) ("Indiana's definition of 'defect' is similar to what is commonly referred to as the consumer expectation test"); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1053 (Ind. Ct. App. 1990) (explaining criteria relevant to consumer expectations test)
Oklahoma – *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988) (consumer expectation test is used to determine if product is defective)
b. Variations on the Risk–Utility Balancing Test
District of Columbia – *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995) (the District of Columbia applies the risk–utility balancing test to determine if a product is dangerously defective, which requires a plaintiff to " 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger' ")
Mississippi – *Gilbert v. Dressler Indus.*, 158 F.R.D. 89, 91 (Miss. Ct. App. 1993) ("Mississippi applies a 'risk–utility' test and has done so since 1987") (citations omitted)
Massachusetts – *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (applying the risk–utility test; in addition, plaintiff must establish that there was no reasonable alternative available that would have reduced the harm)
c. Examples of States that Apply a Combination of the Risk–Utility and Consumer Expectation Tests
Alaska – *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979) (the risk–utility test should be applied in cases in which "the product satisfies ordinary consumer expectations as to its general use but is still 'defective' in that its design exposes the user or bystander to 'excessive preventable danger' ")

Hawaii – *Ontai v. Staub Clinic & Hosp., Inc.*, 659 P.2d 734, 739–40 (Haw. 1983) ("First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective . . . if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design") (citations omitted)
Arizona – *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 879 (Ariz. 1985) ("Where the consumer expectation test is inappropriate, the question of defective and unreasonably dangerous condition may be determined by applying . . . risk/benefit factors") (citations omitted)
California – *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 301 (Cal. 1994) (explaining that risk–utility approach is applied if "ordinary consumers" do not have requisite familiarity with product to allow use of consumer expectation test)
d. Examples of "Combination" States that Shift the Burden Of Proof to Defendants with Respect to Risk–Utility Balancing
California – *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978) (once plaintiff makes prima facie showing that injury was proximately caused by product's design, burden shifts to defendant to show that design's utility outweighs risk)
Alaska – *Caterpillar*, 593 P.2d at 885 (adopting California's *Barker* test for design defect)
e. Examples of Differing Standards with Respect to Design Defect
(1) "Reasonably Prudent Manufacturer" Test
Kentucky – *Tobin v. Astra Pharm. Prod., Inc.*, 993 F.2d 528, 536 (6th Cir. 1993) (Kentucky law), *cert. denied*, 510 U.S. 914 (1993)
West Virginia – *Morning Star v. Black & Decker Mfg. Co.*, 253 S.E. 2d 666, 683 (W.Va. 1979)
(2) "Fit For Ordinary Use" Test
Pennsylvania – *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1027 (Pa. 1978)
South Dakota – *Shaffer v. Honeywell, Inc.*, 249 N.W. 2d 251, 256 (S.D. 1976)

(3) "Unreasonably Dangerous" Test
Missouri – *Racer v. Utterman*, 629 S.W.2d 387, 393 (Mo. App. 1981)
2. Variations With Respect To Standard Of Duty Of Care
a. The "Hand Formula"
Mississippi – *Maryland Cas. Co. v. City of Jackson*, 493 So. 2d 955, 960 n.3 (Miss. 1986) (applying the Hand formula, which involves determining whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence)
New Jersey – *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 117–18 (1985) (applying Hand formula)
b. Section 282 of the Restatement (Second) of Torts Approach
Iowa – *Marcus v. Young*, 538 N.W.2d 285, 288 (Iowa 1995) (using the Restatement approach, which defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm") (internal citations and quotation marks omitted)
Georgia – *Savage v. Flagler Co.*, 364 S.E.2d 52, 57 (Ga. 1987) (applying the Restatement approach), *rev'd on other grounds*, 368 S.E.2d 504, 506 (Ga. 1988)
c. "Appreciable Risk of Harm"
Arizona – *Rodriguez v. Besser Co.*, 565 P.2d 1315, 1322 n.4 (Ariz. Ct. App. 1977) (instructing jury to evaluate whether defendant's "acts created an appreciable risk of causing harm rather than a bare possibility thereof")
Arkansas – Arkansas Model Jury Instructions, Civil 3d 301 (1995) (instructing jury to determine whether defendant's actions taken despite "an appreciable risk of harm")
3. Variations With Respect To Whether Existence Of Duty Is Question For Judge Or Jury
Texas – *Gunn v. Harris Methodist Affiliated Hosps.*, 887 S.W.2d 248, 250 (Tex. Ct. App. 1994) ("The existence of a duty is a question of law for the court to decide.")
Hawaii – *Doe v. Grosvenor Props. Ltd.*, 829 P.2d 512, 513 (Haw. 1992) (existence of duty "is entirely a question of law")

Mississippi – *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1160 (Miss. 1992) ("That courts have ultimate authority to declare duties . . . does not preclude our getting what help we can . . . from juries.")
Indiana – *Harper v. Guarantee Auto Stores*, 533 N.E.2d 1258, 1261–62 (Ind. Ct. App. 1989) (describing the existence of a duty as a "mixed question of law and fact, ultimately to be resolved by the fact–finder")
Wyoming – *Hozian v. Weathermon*, 821 P.2d 1297, 1298 (Wyo. 1991) (duty a mixed question of law and fact)
4. Variations In Determination Of Foreseeability
Michigan – *Trotter v. Hamill Mfg. Co.*, 372 N.W.2d 622, 625 (Mich. Ct. App. 1985) ("The questions of duty and foreseeability are therefore properly determined by the court as matters of law")
California – *Akers v. Kelley Co.*, 219 Cal. Rptr. 513, 520 (Cal. Ct. App. 1985) ("[F]oreseeability is a question of fact for the jury"), *overruled on other grounds by People v. Nesler*, 941 P.2d 87, 101 (Cal. 1997)
Louisiana – *Andrus v. Trailers Unlimited*, 647 F.2d 556, 559 (5th Cir. 1991) (Louisiana law) (applying the duty–risk approach, which conflates the questions of foreseeability and duty, and stating that "[I]t is not the consequences that defendant should have foreseen as 'within the risk' of his conduct that controls the limitation of his liability but the risks that the court, after the conduct has taken place and the injury has been suffered, considers should fall within the 'scope'. . . of the defendant's duty under law, leaving foreseeability as a jury formula for the determination of the violation of duty") (citations omitted)
C. Examples Of Variations In Affirmative Defenses
1. Examples Of "State of the Art" Defense Variations
See generally, John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 750–51 (1983). *See also Restatement (Third) of Torts: Products Liability* § 2 (Mar. 13, 1997) ("The term 'state of the art' has been variously defined by a multitude of courts. For some it refers to industry custom or industry practice; for others it means the safest existing technology that has been adopted for use; for others it means cutting edge technology")
Maryland – *U.S. Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405, 414 (Md. Ct. App. 1994) (Maryland evaluates "state of the art" by the generally accepted view of the relevant expert community at the time the product was sold)
Washington – *Crittenden v. Fibreboard Corp.*, 794 P.2d. 554, 555 n.2 (Wash. Ct. App. 1990) (for state of the art defense Washington measures the

technological feasibility of alternative designs at the time the product was actually manufactured)
2. Examples Of Variations In Affirmative Defenses Based On Plaintiffs' Fault
a. Comparative Negligence Variations
(1) Plaintiff Barred From Recovery If Plaintiff's Fault is Greater Than Defendant's
Texas – Tex. Civ. Prac. & Rem. § 33.001(a) (West 1999) ("claimant may not recover damages if his percentage of responsibility is greater than 50 percent")
Wisconsin – *Delvaux v. Vanden Langenberg*, 387 N.W.2d 751, 756 (Wis. 1986) (comparative negligence bars recovery if greater than negligence of person against whom recovery is sought)
(2) Plaintiff Barred From Recovery If Plaintiff's Fault is Equal To Or Greater Than Defendant's
Georgia – *Union Camp Corp. v. Helmy*, 367 S.E.2d 796, 799–800 (Ga. 1988) (construing statutory provision)
(3) Plaintiff's Recovery Reduced By Percentage of Plaintiff's Fault
Alaska – Alaska Stat. § 9.17.060 (1996) (plaintiff's fault proportionately diminishes the amount of compensatory damages awarded but does not bar recovery)
Florida – Fla. Stat. Ann. § 768.81(2) (2000) (same).
b. Contributory Negligence
Alabama – *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1331, 1333 (Ala. 1993) (plaintiff cannot recover in a negligence suit where plaintiff's own negligence is shown to have proximately contributed to his damage)
District of Columbia – *Nat'l Health Labs. Inc., v. Ahmadi*, 596 A.2d 555, 561 (D.C. 1991) (District of Columbia has not adopted the doctrine of comparative negligence); *Elam v. Ethical Prescription Pharmacy, Inc.*, 422 A.2d 1288, 1289 n.2 (D.C. 1980) (contributory negligence is a complete bar to recovery)

Kentucky – Ky. Rev. Stat. Ann. § 411.320(3) (1996) (doctrine of contributory negligence applies in all product liability actions if plaintiff's behavior was a "substantial cause" of the occurrence regardless of whether the defendant was at fault or the product was defective)
North Carolina – N.C. Gen. Stat. § 99B-4 (2000) (doctrine of contributory negligence applies in all product liability actions premised on negligence or breach of warranty)
c. Variations in the Defense of Misuse
(1) Defense of Misuse Not Treated As A Separate Defense But Is Considered With Respect to Plaintiff's Fault Generally
Alaska – Alaska Stat. Ann. § 09.17.900 (2000) (fault includes "misuse of a product for which the defendant otherwise would be liable")
Minnesota– Minn. Stat. Ann. § 604.01(1a) (2000) (fault includes misuse of the product)
Washington – Wash. Rev. Code Ann. § 4.22.015 (1996) (" 'Fault' includes acts or omissions, including misuse of a product")
(2) Differences in Definition of "Misuse"
Colorado – *Armentrout v. FMC Corp.*, 842 P.2d 175, 187 (Colo. 1992) ("A manufacturer of a product is not legally responsible for injuries caused by a product if [] the product is used in a manner or for a purpose other than that which was intended")
Wyoming – *Anderson v. Louisiana–Pacific*, 859 P.2d 85, 88 (Wyo. 1993) (defining misuse as "using a product for an unintended or unforeseeable purpose")
Idaho – Idaho Code § 6–1405(3) (2001) (" 'misuse' occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances")
(3) Proof of Misuse Complete Bar to Recovery Even Where Doctrine of Comparative Negligence Has Been Adopted
Arizona – Ariz. Rev. Stat. Ann. § 12–683(3) (2000) (in any product liability action, a defendant will not be found liable if the defendant demonstrates that the plaintiff's injury was the result of plaintiff's misuse of the product)
Connecticut – *Elliot v. Sears Roebuck & Co.*, 621 A.2d 1371, 1375 (Conn. App. Ct. 1993) (if defendant proves that plaintiff's misuse of the product, and not the alleged defect, was the proximate cause of plaintiff's injuries, then defendant shielded from liability)

Iowa – *Steinmetz v. Bradbury Co.*, 618 F.2d 21, 23 (8th Cir. 1980) (Iowa law) (same)
(4) Misuse Reduces Amount of Recovery
Florida – *Standard Havens Prods., Inc. v. Benitez*, 648 So. 2d 1192, 1197 (Fla. 1994) (explaining that proof of misuse in strict liability action would reduce plaintiff's recovery in proportion to plaintiff's comparative fault)
Illinois – *Frazer v. A.F. Munsterman Inc.*, 527 N.E.2d 1248, 1257 (Ill. 1988) (misuse reduces amount of recovery)
North Dakota – *Oanes v. Westgo, Inc.*, 476 N.W.2d 248, 254 (N.D. 1991 (misuse reduces amount of recovery)
(5) Variations with Respect to Whether Misuse is a Question of Law or Fact
Texas – *Houston Lighting & Power Co. v. Reynolds*, 712 S.W.2d 761, 770 (Tex. Ct. App. 1986 (jury responsible for determining whether plaintiff misused product), *rev'd on other grounds*] 765 S.W.2d 784 (Tex. 1988)
Idaho – *Watson v. Navistar Int'l-Trans. Corp.*, 827 P.2d 656, 674 (Idaho 1992) (the question of misuse is one of law for determination by the court)
D. Variations Regarding Allocation Of Duties To Judge And Jury
1. Examples Of Differences With Respect To Issues of Defectiveness Or Unreasonable Dangerousness
Connecticut – *Slepski v. Williams Ford, Inc.*, 364 A.2d 175, 178 (Conn. 1975) (issue of product's unreasonable dangerousness is to be decided by the jury)
Tennessee – *Harwell v. Am. Med. Sys. Inc.*, 803 F. Supp. 1287, 1297 (M.D. Tenn. 1992) (under Tennessee law the issue of unreasonable danger is usually a jury question)
Pennsylvania – *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1026 (Pa. 1978) (whether a product is defective or unreasonably dangerous is not "within the orbit of a factual dispute which is properly assigned to the jury"); *Dambacher v. Mallis*, 485 A.2d 408, 420 (Pa. Super. Ct. 1984) ("[T]he trial court will have to rule whether, as a matter of law, the jury could find the radial tire defective")
2. Differences With Respect To Determination Whether Warning Is Adequate
Massachusetts – *Knowlton v. Desert Med., Inc.*, 930 F.2d 116, 120 (1st Cir. 1991) (under Massachusetts law, adequacy of warning is a jury question)

Tennessee – *Goins v. Clorox Co.*, 926 F.2d 559, 561 (6th Cir. 1991) (under Tennessee law, whether a warning is adequate is usually a question for the jury)
Pennsylvania – *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366 (3d Cir. 1992) (under Pennsylvania law, the determination of whether a warning is adequate is a question of law)

UNJUST ENRICHMENT
E. Examples Of State Law Variations With Respect To The Meaning Of "Unjust"
Minnesota – *Servicemaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (defining "unjust" to "mean illegally or unlawfully") (internal quotation marks omitted)
Illinois – *Firemen's Annuity & Benefit Fund v. Mun. Employees', Officers', & Officials' Annuity & Benefit Fund*, 579 N.E.2d 1003, 1007 (Ill. Ct. App. 1993) (expressly rejecting Minnesota's approach and holding that "a cause of action based on unjust enrichment does not require fault or illegality on the part of the defendant")
New York – *Mayer v. Bishop*, 158 A.D.2d 878, 880 (N.Y. App. Div. 1990) (illegality or fault not required for unjust enrichment)
New Hampshire – *Am. Univ. v. Forbes*, 183 A. 860, 862 (N.H. 1936) (unjust enrichment follow from "unlawful" acts); *Petrie–Clemons v. Butterfield*, 441 A.2d 1167, 1172 (N.H. 1982) (recognizing that unjust enrichment may arise when the defendant has "innocently receive[d] a benefit and passively accept[ed] it)
District of Columbia – *4934, Inc. v. District of Columbia Dep't of Employment Servs.*, 605 A.2d 50, 56 (D.C. 1992) (unjust enrichment does not require a finding of "fault on the part of the recipient of the benefit" to prove unjust enrichment)
F. Examples Of State Law Variations With Respect To The Method Of Proving Unjust Enrichment Claims
1. District of Columbia, Texas, Washington and Wyoming
These jurisdictions identify the following as the elements of unjust enrichment: (1) Valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified the person sought to be charged that plaintiff in performing such services or furnishing such materials was expecting to be paid by the person sought to be charged.[1]

[1] *See TVL Assocs. v. A & M Constr. Corp.*, 474 A.2d 156, 159 (D.C. 1984); *Bashara v. Baptist Mem. Hosp.*, 685 S.W.2d 307, 310 (Tex. 1985); *Bailie Communications, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 17 (Wash. Ct. App. 1991); *Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 541-42 (Wyo. 2000).

2. Arizona, Delaware, Louisiana, and North Dakota
These states require a plaintiff to show: (1) An enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of "justification" or "cause" for the enrichment and impoverishment; and (5) the absence of a remedy provided by law.[2]
3. Variations on the Three-Element Standard
a. Idaho, Kentucky, Rhode Island and Tennessee
These states identify the following three elements for an unjust enrichment claim: (1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's appreciation of the benefit; and (3) the defendant's acceptance of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[3]
b. Alaska, Florida, Missouri, Nevada, and Pennsylvania
These jurisdictions apply the three-element standard, with an additional qualification:
(1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's appreciation of the benefit; and (3) the defendant's ***acceptance and retention*** of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[4]

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[2] *See Guarantee Elec. Co. v. Big Rivers Elec. Corp.*, 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987) (applying Kentucky law); *Cmty. Guardian Bank v. Hamlin*, 898 P.2d 1005, 1008 (Ariz. Ct. App. 1995); *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393-94 (Del. Ch. 1999); *Minyard v. Curtis Prods., Inc.*, 205 So.2d 422, 432 (La. 1967); *Apache Corp. v. MDU Res. Group, Inc.*, 603 N.W.2d 891, 894-95 (N.D. 1999).

[3] *See Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917, 923 (Idaho 1999); *Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors*, 589 A.2d 1201, 1201-02 (R.I. 1991); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966).

[4] *See State Dep't Rev., Child Support Enforcement Div. v. Mitchell*, 930 P.2d 1284, 1289 (Alaska 1997) (emphasis added); *Swindell v. Crowson*, 712 So. 2d 1162, 1163 (Fla. Dist. Ct. App. 1998) (per curiam); *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 918 (Mo. Ct. App. 1991) *Topaz Mut. Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992); *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. Ct. 1993).

c. Kansas, Maine, Maryland, Utah, and Wisconsin
These states define unjust enrichment in terms of the three–element standard, but with two qualifications:
(1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's ***appreciation or knowledge*** of the benefit; and (3) the defendant's ***acceptance or retention*** of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.[5]
G. Examples of Differences Among States With Respect to the Relevance of the Defendant's Knowledge of the Benefit
1. Examples of States That Require Plaintiff To Establish Defendant's Knowledge of the Benefit
Alabama – *Utah Foam Prods., Inc. v. Polytec, Inc.*, 584 So.2d 1345, 1350 (Ala. 1991) (requiring that plaintiff establish that defendant had knowledge of the benefit conferred upon him in order to prevail)
Kansas – *J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988) (same)
Maine – *Landry v. Landry*, 697 A.2d 843, 845 (Me. 1997) (same)
Maryland – *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 n.7 (Md. 2000) (same)
New Mexico– *Ontiveros Insulation Co. v. Rawson, Inc.*, No. 19817, 2000 WL 772729, at *3 (N.M. Ct. App. May 15, 2000) (same)
Minnesota – *Servicemaster of St. Cloud*, 544 N.W.2d 302, 306 (Minn. 1996) (same)
North Carolina – *Booe v. Shadrick*, 369 S.E.2d 554, 556–56 (N.C. 1988) (same)
Oregon – *Edward D. Jones & Co. v. Mishler*, 983 P.2d 1086, 1101 (Or. Ct. App. 1999) (same)
South Dakota– *Juttelstad v. Juttelstad*, 587 N.W.2d 447, 451 (S.D. 1998) (same)
Utah – *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1192 (Utah 1996) (same)

[5] *See J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988); *Landry v. Landry*, 697 A.2d 843, 845 (Me. 1997); *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 n.7 (Md. 2000); *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1192 (Utah 1996); *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

Wisconsin– *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987) (same)
2. Examples of States That Do Not Require Defendant Have Knowledge of the Benefit
Colorado – *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 119–120 (Colo. 1998) (en banc) (unjust enrichment occurs when "(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying")
New York – *Lake Minnewaska Mountain Houses Inc. v. Rekis*, 259 A.D.2d 797, 798 (N.Y. App. Div. 1999) (citing *Paramount Film Distrib. Corp. v. New York*, 30 N.Y.2d 415, 421 (1972) (unjust enrichment requires only that plaintiff prove "that (1) the defendant was enriched (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit . . . defendant to retain what is sought to be recovered'" to prevail))
Illinois – *HPI Health Case Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989)(unjust enrichment occurs when "the defendant has unjustly retained a benefit to the plaintiff's detriment, and . . . defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience")
Michigan – *B & M Die Co. v. Ford Motor Co.*, 421 N.W.2d 620, 622 (Mich. Ct. App. 1988) (unjust enrichment requires the "(1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain")

EXPRESS WARRANTY
II. VARIATIONS IN GOVERNING EXPRESS WARRANTY PRINCIPLES
A. Examples Of State Variations With Respect To What Statements Suffice To Create An Express Warranty
Missouri – *Chase Resorts, Inc. v. Johns-Manville Corp.*, 476 F. Supp. 633, 638 (E.D. Mo. 1979) (statement that irrigation system "would provide years of trouble free service" did not create an express warranty because the length and parameters of the trouble free service were not "susceptible of exact knowledge"), *aff'd*, 620 F.2d 203 (8th Cir. 1980)
Wisconsin – *Ewers v. Eisenzopf*, 276 N.W.2d 802, 805 (Wis. 1979) (test is " 'whether [the seller] made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it' ") (citation omitted)
Ohio – *Jones v. Kellner*, 451 N.E.2d 548, 549 (Ohio Ct. App. 1982) (a "positive statement of the quality of the goods is an express warranty if the natural tendency of the statement is to induce a buyer to purchase the goods, and if the buyer purchases the goods in reliance thereon") (citation omitted)
Nebraska – *Mennonite Deaconess Home & Hosp., Inc. v. Gates Eng'g Co.*, 363 N.W.2d 155, 161 (Neb. 1985) (the "test is 'whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely . . . expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment' " (citation omitted)
B. Examples Of Variations In Actual Reliance Requirement
New Jersey – *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 569 n.34 (3d Cir. 1990), *aff'd in part & rev'd in part*, 505 U.S. 504 (1992) ("in the context of advertisements claimed to be warranties, a plaintiff buyer [in New Jersey] must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement . . . . Successfully proving disbelief creates a new rebuttable presumption of nonreliance. Finally, the plaintiff may rebut this presumption by proving reliance directly")
Florida – *State Farm Ins. Co. v. Nu Prime Roll-A-Way, Inc.*, 557 So. 2d 107, 108 (Fla. Dist. Ct. App. 1990) (a "seller's representations in newspaper advertisements . . . [may] constitute an express warranty . . . to one who, in making the purchase, relies thereon to his injury")
Mississippi – *Global Truck & Equip. Co. v. Palmer Mach. Works*, 628 F. Supp. 641, 651 (N.D. Miss. 1986) (Mississippi law) (no warranty was created by affirmations because plaintiff did not prove that he relied on the seller's statement)
Illinois – *Felley v. Singleton*, 705 N.E.2d 930, 934 (Ill. App. 2d 1999) (while holding that showing of reliance not necessary, court states, "[w]e recognize

that Illinois courts have not always consistently stated these principles")
Colorado – *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 644-45 (10th Cir. 1991) (Colorado law) (express warranty created by statements in seller's brochure even though buyer did not rely on the statements)
Virginia – *Daughtrey v. Ashe*, 413 S.E.2d 336, 338-39 (Va. 1992) (buyer need not prove reliance on description because the UCC was intended to modify the traditional requirement of reliance)
Washington – *Baughn v. Honda Motor Co.*, 727 P.2d 655, 669 (Wash. 1986) (even though reliance need not be proven, the plaintiff must at least be aware of representations to recover for breach of express warranty)
C. Examples Of Variations With Respect To Whether Post-Sale Representations Can Create Express Warranties
1. Post-Sale Representations May Create Express Warranties
California, Utah – *Downie v. Abex Corp.*, 741 F.2d 1235, 1240-41 (10th Cir. 1984) (California and Utah law) (warranty was created when post-sale representations about a product were made in an effort to promote future sales)
Maryland – *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1424 (4th Cir. 1985) (Maryland law) (valid express warranty was created by salesman's post-sale representations because purchase of mower was conditioned on subsequent inspection of the property by the salesman)
2. Post-Sale Representations Cannot Create Express Warranties
Arizona – *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 390 (Ariz. 1981) (post-bargain representations were not express warranties because of the absence of reliance by buyer)
Colorado – *Anderson v. Heron Eng'g Co.*, 604 P.2d 674, 676 (Colo. 1979) (in order for statement made in seller's brochure to constitute an express warranty, buyer must have "seen or otherwise relied on" it at the time of purchase)
Maine – *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321 (Me. 1982) (owner's manual not seen by buyer until after the purchase was not part of the "basis of the bargain" and hence did not create an express warranty)

III. VARIATIONS IN OTHER STANDARDS APPLICABLE TO BOTH EXPRESS AND IMPLIED WARRANTY CLAIMS[6]
A. States Follow Differing Rules Concerning The Element Of Notice Of Breach
1. Examples Of States That Require Notice To Be Given Directly To Manufacturer
Arkansas – *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977) (requiring notice to manufacturer)
Oregon – *Redfield v. Mead, Johnson & Co.*, 512 P.2d 776, 781 (Or. 1973) (requiring notice to manufacturer)
Wyoming – *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo. 1980) (same)
2. Examples Of States In Which Notice To Immediate Seller Is Sufficient
Colorado – *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 742 (Colo. 1991) (purchaser injured by product not required to give notice to remote manufacturer before initiating litigation)
Minnesota – *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992) (notice requirement to manufacturer satisfied by notice to distributor if manufacturer and distributor are in agency relationship), *rev'd on other grounds*, 615 N.W.2d 302 (Minn. 2000)
3. Examples Of Variations With Respect To Time Period Within Which Notice Must Be Given
a. Examples Of States Where Delays Of Several Months Have Barred Suit
District of Columbia – *Mariner Water Renaturalizer, Inc. v. Aqua Purification Sys., Inc.*, 665 F.2d 1066, 1069 (D.C. Cir. 1981) (District of Columbia law) (delay of five to eight weeks in notification held untimely)
Massachusetts – *P & F Constr. Corp. v. Friend Lumber Corp.*, 575 N.E.2d 61, 64 (Mass. App. Ct. 1991) (3-1/2 months delay untimely)
Oregon – *Wagner Tractor Inc. v. Shields*, 381 F.2d 441, 445 (9th Cir. 1967) (Oregon law) (4-1/2 month delay in giving notice held untimely)

[6] For additional examples of variations in law relating to implied warranty, see Tab D of this submission.

b. Examples Of States That Tolerate Longer Delays
Florida – *Lafayette Stabilizer Repair, Inc. v. Mach. Wholesalers, Corp.*, 750 F.2d 1290, 1294 (5th Cir. 1985) (Florida law) (delay of six months not untimely)
North Carolina – *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 685 (N.C. 1981) (delay of three years held not to have been "unreasonable as a matter of law")
South Dakota – *Opp v. Nieuwsma*, 458 N.W.2d 352, 356-57 (S.D. 1990) (four month delay not untimely)
B. States Differ As To The Availability And Content Of Affirmative Defenses In Warranty Cases
1. Examples Of Variations In Product Misuse Inquiry
North Carolina – N.C. Gen. Stat. § 99B-4(1) (2000) (no liability if "[t]he use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product")
District of Columbia – *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725-26 (D.C. 1985) ("[p]roduct 'misuse' is defined as use of a product in a manner that could not reasonably be foreseen by the defendant") (citation omitted)
Idaho – Idaho Code § 6-1405(3)(a) (2000) (" 'Misuse' occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person")
2. Examples Of Variations With Respect To Availability And Form Of Contributory Or Comparative Negligence As Defenses In Warranty Actions
New Hampshire – *Stephan v. Sears Roebuck & Co.*, 266 A.2d 855, 858 (N.H. 1970) ("contributory negligence is a defense to an action for breach of warranty")
Michigan – *In re Certified Questions*, 331 N.W.2d 456, 462 (Mich. 1982) (applying Michigan's comparative negligence statute to breach of warranty; plaintiff's recovery is reduced by the amount of his or her own fault, no matter how great it is)
Arkansas – Ark. Code Ann. § 16-64-122 (Michie 1999) (comparative fault statute applies by its terms to breach of warranty, and bars recovery by a plaintiff whose fault *is equal to or greater than* that of the defendant)
Delaware – Del. Code Ann. tit. 10, § 8132 (2000) (recovery denied if comparative negligence is greater than 50%)

Colorado – *Hensley v. Sherman Car Wash Equip. Co.*, 520 P.2d 146, 148 (Colo. Ct. App. 1974) ("The concept of contributory negligence, as it is known in negligence case law . . . has no place in actions premised on breach of warranty")
Texas – *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 329 (Tex. 1978) (unlike Texas system of modified comparative negligence, buyer in warranty action is entitled to recover that portion of the damages caused by the unsuitable product, even if the buyer's negligence or fault constitutes a greater cause of the damages than the seller's breach)
Arkansas – *Little Rock Elec. Contractors v. Okonite Co.*, 744 S.W.2d 381, 382 (Ark. 1988) (comparative fault statute only applies to actions for wrongful death or injury to person or property)
C. States Differ As To The Availability Of Incidental And Consequential Damages
New Jersey – *Gladden v. Cadillac Motor Div.*, 416 A.2d 394, 408 (N.J. 1980) (no presumption of unconscionability where tire manufacturer limited damages)
Mississippi – *See* Miss. Code Ann. §§ 11-7-18, 75-2-719(4) (1993) (Mississippi appears to prohibit implied warranty remedy limitations altogether)
Utah – *Schurtz v. BMW of N. Am.*, 814 P.2d 1108, 1114 (Utah 1991) (provisions limiting incidental and consequential damages are generally unconscionable in consumer settings)
Connecticut – *McKernan v. United Tech. Corp.*, 717 F. Supp. 60, 69 (D. Conn. 1989) (Connecticut law) (warranty disclaimer of consequential damages is invalid if the defendant's limited remedy fails of its essential purpose)
Tennessee – *Aquascene Inc. v. Noritsu Am. Corp.*, 831 F. Supp. 602, 604 (M.D. Tenn. 1993) (Tennessee courts would likely read consequential damages and "failure of essential purpose" subsections as distinct and separate)
Illinois – *Smith v. Navistar Int'l Transp. Corp.*, 714 F. Supp. 303, 308 (N.D. Ill. 1989) (Illinois law) (disclaimer not binding if buyer can demonstrate that warranty fails of its essential purpose *and* that the parties did not contractually allocate all the attendant risks), *aff'd*, 957 F.2d 1439 (7th Cir. 1992)
D. States Differ As To The Standards For Determining Whether Warranty Terms Are Unconscionable
Arkansas – *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299, 303 (8th Cir. 1986) (in determining unconscionability a court must consider the following factors: "[(1)] the general commercial background, [(2)] commercial needs in the trade or particular case, [(3)] the relative bargaining position of the parties, and [(4)] and other circumstances at the time the contract was made")

Wyoming – *Hutton v. Deere & Co.*, No. 99-8053, 2000 U.S. App. LEXIS 6285, *14-15 (10th Cir. Apr. 5, 2000) (the unconscionability inquiry in Wyoming involves the consideration of six elements: "(1) Was a party deprived of a meaningful choice as to whether to enter into the contract? (2) Was a party compelled to accept the terms of the contract? (3) Was there an opportunity for a meaningful negotiation? (4) Was there a great inequality of bargaining power? (5) Was one party readily subject to deception? [and,] (6) Was one party in some manner surprised by fine print or concealed terms?")

IMPLIED WARRANTY
E. Examples Of States That Would Bar The Implied Warranty Claims Of Non-Incident Plaintiffs Because Of Lack Of Vertical Privity
Alabama – *Rhodes v. Gen. Motors Corp.*, 621 So. 2d 945, 947 (Ala. 1993) ("without privity of contract, there is no right of action against a manufacturer for direct economic loss" in Alabama)
Arizona – *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 388 (Ariz. 1981) (Arizona maintains a "requirement of privity of contract to recover for breach of implied and express warranties under the Arizona Uniform Commercial Code")
California – *Osborne v. Subaru of Am.*, 243 Cal. Rptr. 815, 820-21 (Cal. Ct. App. 1988) ("[i]n California, [vertical] privity is required" to sue a remote automobile distributor under the UCC)
Connecticut – *Keollmer v. Chrysler Motor Corp.*, 276 A.2d 807, 812 (Conn. Cir. Ct. 1970) (imposing vertical privity requirement when only economic loss is involved)
Florida – *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 788 F. Supp. 1203, 1206 (S.D. Fla. 1992) ("[p]rivity of contract between plaintiff and defendant is an essential element of the breach of implied warranty cause of action" in claim for economic loss), *aff'd*, 67 F.3d 901 (11th Cir. 1995)
Georgia – *Ford Motor Co. v. Lee*, 224 S.E.2d 168, 171 (Ga. Ct. App.), *aff'd in part and rev'd in part*, 229 S.E.2d 379 (Ga. 1976); *Mullins v. M.G.D. Graphics Sys. Group*, 867 F. Supp. 1578, 1584 (N.D. Ga. 1994) ("[u]nder Georgia law, [p]laintiff cannot recover [for breach of implied warranty] unless [he] can demonstrate privity of contract")
Hawaii – *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1284 (Haw. 1992) (privity required in implied warranty where "purely economic loss is the gravamen of the complaint")
Idaho – *Oats v. Nissan Motor Corp. in U.S.A.*, 879 P.2d 1095, 1102 (Idaho 1994) ("[t]he UCC's warranty provisions were not meant to govern cases . . . where there is no privity of contract between the plaintiff and the defendant")
Illinois– *Thomas v. Bombardier-Rotax Motorenfabrik*, 869 F. Supp. 551, 556 & n.7 (N.D. Ill. 1994) ("[g]enerally plaintiffs suing for breach of warranty in Illinois must establish both vertical and horizontal privity" and the Illinois Supreme Court has "held that privity is required when the plaintiff is suing

to recover for purely economic injury")
Indiana – *Horn v. A.O. Smith Corp.*, 884 F. Supp. 1226, 1244 (N.D. Ind. 1994) (privity is "a requirement for maintaining a claim for breach of implied warranties" in Indiana), *rev'd on other grounds*, 50 F.3d 1365 (7th Cir. 1995)
Iowa – *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995) ("an extension of implied warranty theories to non-privity buyers . . . would spawn numerous problems in the operation of the Uniform Commercial Code") (citation omitted)
Kansas – *Prof'l Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898-99 (Kansas 1984) (requiring privity when only economic loss is involved)
Michigan – *Nat'l Sand Inc., v. Nagel Constr. Inc.*, 451 N.W.2d 618, 620 (Mich. 1990) (lack of vertical privity bars contract-based implied warranty claim)
New York – *Mazzuocola v. Thunderbird Prods. Corp.*, No. 90-CV-0405, 1995 WL 311397, at *2 (E.D.N.Y. May 16, 1995) (New York "maintaining what appears to be the majority position, requires privity")
North Carolina – *Sharrad, McGee & Co. v. Suz's Software, Inc.*, 396 S.E.2d 815, 818 (N.C. Ct. App. 1990) (In North Carolina, "the general rule is that privity is required to assert a claim for breach of implied warranty involving only economic loss")
Ohio – *St. Paul Fire & Marine Ins. Co. v. R.V. World, Inc.*, 577 N.E.2d 72, 75 (Ohio Ct. App. 1989) ("a long line of cases has developed the principle that absent privity, a plaintiff cannot bring a contract action for breach of implied warranty")
Oregon – *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217-18 (Or. 1968) (requiring vertical privity, at least where only economic loss is involved)
Rhode Island – *Henry v. John W. Eshelman & Sons*, 209 A.2d 46, 47 (R.I. 1965) (vertical privity required where economic injury involved).
Tennessee – *McCrary v. Kelly Technical Coatings, Inc.*, 1985 WL 75663, at *3 (Tenn. Ct. App. Aug. 28, 1985) ("[p]rivity has been abolished in [implied warranty] actions in Tennessee *only* with regard to 'personal injury or property damage'" and not with respect to purely economic losses) (emphasis added); *Walker Truck Contractors, Inc. v. Crane Carrier Co.*, 405 F. Supp. 911, 919 n.12 (E.D. Tenn. 1975) (the ultimate purchaser cannot recover purely "economic losses" against the remote manufacturer "because T.C.A. [29-34-104] . . . abolishes privity as a defense only with respect to actions for personal injuries or property damage")
Utah – *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 18 n.8 (Utah 1990) (waiving privity requirement only with respect to certain beneficiaries of seller's warranty)

Vermont – *Mainline Tractor & Equip. Co., v. Nutrite Corp.*, 937 F. Supp. 1095, 1108 (D. Vt 1996) (Vermont has not eliminated vertical privity requirement)
Virginia – *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 491 S.E.2d 731, 734 (Va. 1997) (where no injury to persons or property involved, privity of contract required)
Washington – *Baughn v. Honda Motor Co.*, 727 P.2d 655, 669 (Wash. 1986) ("[c]ontractual privity between buyer and seller traditionally has been required before a plaintiff may maintain [] an action [for breach of express or implied warranty] under the Code")
Wisconsin – *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179, 187 (Wis. 1991) ("[p]rivity is a requirement for a cause of action based on implied warranty")
F. Examples Of Other Variations With Respect To Privity
1. Owners Of Used Vehicles
Pennsylvania - *Graub v. David*, 1974 WL 21710 (Pa. Ct. C.P. May 23, 1974) (Pennsylvania law does not "extend a seller's warranty to subsequent purchasers").
2. Business Purchasers
Kansas – *see* Kan. Stat. Ann. § 50-639 (2000) (permitting implied warranty claims in the absence of privity by consumers, but not necessarily by businesses)
Oregon – *Dravo Equip. Co. v. German*, 698 P.2d 63, 65 (Or. Ct. App. 1985) (privity required in Oregon in suits for economic loss for both express and implied warranties); *but see* Or. Rev. Stat. § 72-8020 (1999) (Oregon Sale of Consumer Goods Act) (abrogating privity requirement with respect to purchases for personal use: "the manufacturer of a consumer good to be sold at retail in [Oregon] gives . . . the manufacturer's implied warranty of merchantability")
G. Examples Of State Variation In The Standard Of Merchantability For New Goods
Kansas – *see* Kan. Stat. Ann. § 50-624(e) (2000) ("'merchantable' means, in addition to the qualities prescribed in Kan. Stat. Ann. § 84-2-314 . . . conformity in all material respects with applicable state and federal statutes and regulations establishing standards of quality and safety")
West Virginia – *see* W. Va. Code § 46A-6-102(c) (2000) (in addition to definition in W. Va. Code § 46-2-314 (1995) "merchantable" means that "goods

conform in all material respects to applicable state and federal statutes and regulations," and "that the goods are in good working order and will operate properly in normal usage for a reasonable period of time")
Massachusetts – *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) ("[u]nder Massachusetts law the question of fitness for ordinary purposes is largely one centering around reasonable *consumer* expectations") (emphasis added)
New York – *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995), *aff'd*, 79 F.3d 12 (2d Cir. 1996) (implied warranty "inquiry focuses on [consumer] expectations" and the "'ordinary purpose' for which the product was marketed and sold to *the plaintiff*" was suburban driving, not offroad use) (emphasis added)
Georgia – *Horne v. Claude Ray Ford Sales, Inc.*, 290 S.E.2d 497, 499 (Ga. Ct. App. 1982) (damage to a new car that does not affect a vehicle's "usefulness or its driveability" will not affect merchantability)
Illinois – *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 172-73 (Ill. App. Ct. 1972) (merchantable vehicle "should be in a safe condition and substantially free of defects")
New Hampshire – *Fitzgerald-Hicks Dodge, Inc.*, 430 A.2d 144, 148 (N.H. 1981) (unmerchantable vehicle is "not of average quality or fit for the ordinary purpose for which an automobile is used")
Texas – *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (holding that "[i]n the context of an implied warranty of merchantability case the word 'defect' means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy")
Vermont – *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 272 (Vt. 1972) (merchantability is "primarily directed at the operative essentials of a product," including "operational safety")
H. Examples Of Variations In Standard Of Merchantability For Used Goods
1. No Distinction Between New And Used Goods
South Dakota – *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31, 36 (S.D. 1983) (holding that "[i]f the framers of the U.C.C. had intended to exclude . . . used or secondhand goods from any implied warranties, merchantability or otherwise, they could easily have done so") (citation omitted)
Idaho – *Lee v. Peterson*, 716 P.2d 1373, 1375 (Idaho Ct. App. 1986) ("[t]he warranty [of merchantability] extends to used goods")
Illinois – *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 171-72 (Ill. App. Ct. 1972) ("[d]efects which have been held to make operation of a

new automobile unfit and thereby cause a breach of implied warranties may result in the breach of the same warranties on a used automobile")
Missouri – *Brazeal v. Craig*, 683 S.W.2d 329, 330 (Mo. Ct. App. 1984) ("extend[ing] an implied warranty of merchantability to used or second-hand automobiles")
2. Examples Of States In Which Implied Warranty Of Merchantability Does Not Apply To Used Goods
Texas – *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. Ct. App. 1983) ("[u]nder Texas law, no implied warranty to the sale of used goods attaches where they are purchased with knowledge that they were used")
Tennessee – *McGee v. Nashville White Trucks, Inc.*, 633 S.W.2d 311 (Tenn. Ct. App. 1981) (no warranty on used truck that failed to operate within 45 days of purchase)
3. Examples Of States That Apply An Adjusted Standard Of Merchantability To Used Goods
Kansas – *Int'l Petroleum Serv., Inc. v. S&N Well Serv., Inc.*, 639 P.2d 29, 34 (Kan. 1982) ("the extent of the [implied warranty] obligation of a merchant who sells used goods depends on the circumstances of the transaction")
Mississippi – *Beck Enters., Inc. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987) ("[u]sed goods are reasonably expected to require more maintenance and repair and their quality should not be measured on the same scale as that of new goods . . . [i]f [used goods] conform to the quality of other similar used goods, they will normally be merchantable")
Virginia – *Whittle v. Timesavers, Inc.*, 614 F. Supp. 115, 118 (W.D. Va. 1985) (Virginia law) ("the warranty which attaches to a used good obviously takes into account normal wear and tear")
Washington – *Testo v. Russ Dunmire* Oldsmobile, *Inc.*, 554 P.2d 349, 354 (Wash. Ct. App. 1976) (to be merchantable, used car "must be in reasonably safe condition and substantially free of defects which render it inoperable")
4. Examples Of Variations In Duration Of Implied Warranty
California – Cal. Civ. Code § 1791.1(c) (West 1995) ("in no event shall [an] implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer")
Alabama – *Century 21-Reeves Realty, Inc. v. McConnell Cadillac, Inc.*, 626 So. 2d 1273, 1275 (Ala. 1993) (manufacturer not liable where it expressly limited duration of implied warranty of merchantability) (*citing* Ala. Code. Ann. § 7-2-316 (2000), *rev'd on other grounds*, 655 So. 2d 909, 919 (Ala. 1994)

District of Columbia – *Patton v. Chrysler Motors Corp.*, No. SC 21171-88, 1990 WL 317473, at *4 (D.C. Super. Ct. May 30, 1990) (District of Columbia "restrict[s] a merchant's ability to limit the duration of implied warranties") (*citing* D.C. Code § 28:2-316)
5. Examples Of State Law Variations With Respect To Measure Of Diminution-In-Value Damages Under UCC § 2-714(2)
Georgia – *Chrysler Corp. v. Marinari*, 339 S.E.2d 343, 345-46 (Ga. Ct. App. 1985) (plaintiffs may produce evidence of the difference in value at the time of acceptance and at no other time)
Virginia – *Wharton, Aldhizer & Weaver v. Savin Corp.*, 350 S.E.2d 635, 636-37 (Va. 1986) (same)
Mississippi– *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1029 (Miss. 1982) (permitting evidence of difference in value at a time subsequent to acceptance)
South Carolina – *Ellison v. Heritage Dodge, Inc.*, 320 S.E.2d 716, 717-18 (S.C. Ct. App. 1984) (same)

STATE CONSUMER PROTECTION ACTS

A. Variations In Prohibited Conduct In State Consumer Protection Acts ("CPAs")
1. Examples Of CPAs That Focus Narrowly On "Deceptive" Behavior
Georgia - Ga. Code Ann. § 10-1-372 (2000) (prohibiting deceptive practices).
Kansas - Kan. Stat. Ann. § 50-626 (2000) (prohibiting deceptive acts).
South Dakota - S.D. Codified Laws Ann. § 37-24-6 (2001) (prohibiting deceptive acts).
2. Examples Of CPAs That Prohibit Broader Categories Of Conduct
Alabama - Ala. Code § 8-19-3 (1999) (prohibiting *unconscionable* or deceptive acts or practices).
Alaska - Alaska Stat. § 45.50.471 (1999) (prohibiting *unfair* or deceptive acts).
Florida - Fla. Stat. Ann. § 501.201 (2000) (prohibiting *unconscionable* or *unfair* or deceptive acts).
Mississippi - Miss. Code Ann. § 75-24-5 (2001) (prohibiting *unfair* or deceptive acts).
South Carolina - S.C. Code Ann. § 39-5-20 (2000) (prohibiting *unfair* or deceptive acts).
3. Examples Of CPAs That Proscribe Specific Acts And Practices
California - Cal. Civ. Code § 1770(a) (2000) (specifically proscribes 23 itemized activities, including "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have" or "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another").
New Jersey - N.J. Rev. Stat. § 56:8-2 (2000) (proscribes several broad categories of behavior, including "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate").

4. Examples Of CPAs That Contain General Prohibitions On Conduct Without Enumerating Specific Prohibited Acts
Florida - Fla. Stat. Ann. § 501.204 (2000) (stating that "[u]nfair methods of competition, unconscionable acts or practice and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful" and referencing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), for interpretive guidance).
B. Variations In Threshold Issues Arising Under State CPAs
1. Private Right Of Action Under The CPA
a. Examples Of CPAs That Expressly Recognize A Private Right Of Action
Michigan - Mich. Comp. Laws § 19.418(11) (1995) (recognizing private right of action).
New Jersey - N.J. Stat Ann. § 56:8-2.12 (1995) (authorizing private right of action).
Oregon - Or. Rev. Stat. § 646.150 (1999) (allowing private action for damages).
b. Examples Of CPAs That Authorize A Private Right Of Action For Damages Only
Arkansas - Ark. Code Ann. § 4-88-113(f) (1999).
Oregon - Or. Rev. Stat. § 646.150 (1999).
c. Examples Of Jurisdictions Where Courts Have Implied A Private Right Of Action Where The CPA Does Not Expressly Authorize One
Arizona - *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P/2d 1119, 1122 (Ariz. 1974) (sanctioning private right of action).
Delaware - *Young v. Joyce*, 351 A.2d 857, 859 (Del. Super. Ct. 1975) (statutory purpose supports recognition of private cause of action); *Edwards v. Porter*, Civ. A. No. 88C-OC-174, 1991 WL 165877, *8 (Del. Super. Ct. 1991) (as consumer protection bill, Deceptive Trade Practices Act gives an individual a private cause of action); *but see Wald v. Wilmington Trust Co.*, 555 A.2d 853, 854 (Del. Super. Ct. 1988) (statute meant to provide remedy for injuries to business interests, rather than for harm to individuals).
d. Examples Of Jurisdictions Where The Courts Have Not Yet Determined Whether A Private Right Of Action Exists When The CPA Does Not Expressly Authorize One

Iowa - Iowa's CPA is part of its penal code and a violation is characterized as theft. *See* Iowa Code Ann. § 714.16 (2000). No court has explicitly ruled on whether a corresponding private right of action exists.
e. Examples Of Jurisdictions Where The Existence Of A Private Right Of Action Under The CPA Has Changed Over Time
North Dakota - N.D. Cent. Code § 51-15-09 (1999) (providing for a private right of action *after* July 7, 1991).
2. Definition of "Consumers" Under the CPA Vary
a. Examples Of CPAs That Define A "Consumer" As A Person Buying Goods Or Services For Personal, Family, Or Household Use
Alabama - Ala. Code § 8-19-3(2) (2000) ("[a]ny natural person who buys goods or services for personal, family or household use")
California - Cal. Civ. Code § 1761(d) (2000) ("an individual who seeks or acquires … any goods or services for personal, family, or household purposes").
Georgia - Ga. Code Ann. § 10-1-392(3) (2000) ("means the sale … primarily for personal, family, or household purposes").
b. Examples Of CPAs That Use More Narrow Definitions Of Consumer
Hawaii - *Paulson, Inc. v. Bromar, Inc.*, 775 F. Supp. 1329, 1339 (D. Haw. 1991) (defining consumers as "natural person … who commits money, property, or services in a personal investment").
c. Examples Of CPAs That Use More Expansive Definitions Of Consumer That Include Purchases Of Products For Agricultural Use
Maryland - Md. Com. Law Code Ann. § 13-101(2)(d) (2000) (defining consumer transactions as sales "primarily for personal, household, family, or agricultural purposes").
West Virginia - W. Va. Code § 46A-6-102(b) (2000) (defining a consumer transaction as a "sale or lease to a natural person or persons for a personal, family, household or agricultural purpose").
d. Examples Of CPAs That Include Purchases By Businesses In Their Definition Of Consumer Transactions

New Jersey - N.J. Rev. Stat. Ann. § 56:8-2 (2000) (statute encompasses the "sale or advertisement of any merchandise or real estate," not limiting transactions to individuals).
Kansas - Kan. Stat. Ann. § 50-624(b) (2000) (defining consumer as "an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business or agricultural purposes").
Texas - Tex. Bus. & Com. Code Ann. § 17.45(4) (2001) (consumer "means an individual, partnership, corporation … except that term does not include a business consumer that has assets of $ 25 million or more, or that is owned or controlled by a corporation or entity with assets of $ 25 million or more").
Utah - Utah Code Ann. § 13-11-3(2) (2000) (consumer transaction "means a sale … to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged").
e. Examples Of CPAs That Differ On Whether A Consumer Transaction Should Be Determined On An Objective Basis Or A Subjective Basis
Oregon - *Miller v. Hubbard-Wray, Co. Inc.*, 630 P.2d 880, 885 (Or. Ct. App. 1981) ("There was no evidence to support the allegation that hay bales are goods 'customarily bought by a substantial number of purchasers for personal, family, or household uses.' … Nor is it a fact of such 'general notoriety' that we can take judicial notice of it") (citations omitted).
Pennsylvania - *Valley Forge Towers S. Condo. v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641, 648 (Pa. Super. Ct. 1990) ("Mameco's focus upon the type of product involved is misplaced. The restriction included in the act addresses itself solely to the purpose of the purchase, not the type of product purchased."), *aff'd*, 605 A.2d 798 (Pa. 1992).
3. Availability And Class Actions Procedures Vary Under The CPAs
a. Examples Of CPAs That Bar Class Actions
Alabama - Ala. Code § 8-19-10(f) (2000) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class").
Georgia - Ga. Code Ann. § 10-1-399(a) (2000) (prohibiting actions brought "in a representative capacity").
Mississippi - Miss. Code Ann. § 75-24-15(4) (2000) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person").

Louisiana - La. Rev. Stat. Ann. § 51:1409 (West 2000) (prohibiting actions brought "in a representative capacity").
South Carolina - S.C. Code Ann. § 39-5-140(a) (2000) (prohibiting actions brought in a representative capacity).
b. Examples Of CPAs That Permit Class Actions Subject To Certain Restrictions And Limitations
Utah - Utah Code Ann. § 13-11-20 (2000) (class actions allowed only with respect to act or practice specified as a violation in a rule adopted by the enforcing authority before the act occurred, or by a court in a judgment that was either officially reprinted or made available for public dissemination ten days before the action occurred); *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 755 (Utah Ct. App. 1990) (concurring opinion) (noting that a class action could not be brought until after publication of a rule or entry of a final judgment declaring the defendant's activities illegal).
New Mexico - N.M. Stat. Ann. § 57-12-10(E) (2000) ("In any class action filed under this section, the court may award damages to the named plaintiff as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class").
Ohio - Ohio Rev. Code Ann. § 1345.09(B) (2000) (limiting class action damages to actual damages or other appropriate relief whereas individual plaintiffs may collect up to treble damages).
C. Variations In What Constitutes Deceptive Behavior Under State CPAs
1. State CPAs Vary On Whether Scienter Is Required
a. Examples Of CPAs That Do Not Require A Showing Of Intent To Deceive
Massachusetts - *Bond Leather Co., v. Q.T. Shoe Mfg. Co., Inc*, 764 F.2d 928, 937 (1st Cir. 1985) (Massachusetts law) (intent to deceive is not an element of the violation).
Maine - *Maine v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 365 (Me. 1987) (no showing of intent to deceive required).
Texas - *Williams v. Trail Dust Steak House, Inc.*, 727 S.W.2d 812, 814 (Tex. Ct. App. 1987) (no showing of intent to deceive required).
b. Examples Of CPAs That Require A Showing Of Intent To Deceive
Kansas - *Porras v. Bell*, 857 P.2d 676, 678 (Kan. Ct. App. 1993) (proof of intent required).
Georgia - *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 262 S.E.2d 820, 823-24 (Ga. Ct. App. 1979) (Georgia requires an "unfair or deceptive act or practice conjoined with culpable knowledge of the nature (but not necessarily the illegality) of the act").

New Jersey - *Knapp v. Potamkin Motors Corp.*, 602 A.2d 302, 304 (N.J. Super. Ct. Law Div. 1991) (delineating higher standard of proof required in private actions).
Utah - *Wade v. Jobe*, 818 P.2d 1006, 1016 (Utah 1991) (defendant must act with intent to deceive).
c. Examples Of CPAs That Require Only A Showing That The Defendant Intended To Induce Reliance
Illinois - *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 198 (Ill. 1992) (plaintiff need only prove an intent on part of defendant that plaintiff rely on defendant's statement).
Minnesota - *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 727 (Minn. 1983) (defendant must have intent that others rely on his statements/actions).
d. Examples Of CPAs That Require Proof Of Some Intermediate Degree Of Intent
Tennessee - *Smith v. Scott Lewis Chevrolet Inc.*, 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992) (although intent to deceive need not be shown, the concept of deception requires that an element of intent be present).
e. Examples Of CPAs That Require Showing That The Defendant Knew His Conduct Was Deceptive To Recover
Colorado - *Bidwell v. German Motors, Inc.*, 586 P.2d 1003, 1006 (Colo. Ct. App. 1978) (no violation of CPA where no showing of knowing false representation).
New Mexico - *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311-12 (N.M. 1991) (stating that the "knowingly made" requirement of New Mexico's CPA is met "if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading").
Oregon - *Luedeman v. Tri-West Constr. Co.*, 592 P.2d 281, 282 (Or. Ct. App. 1979) (noting that "[a] willful [CPA] violation occurs when the person committing the violation knew or should have known that his conduct was a violation").
f. Examples Of CPAs That Do Not Require Any Showing That Defendant Knew His Conduct Was Deceptive
North Carolina - *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990) ("That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under N.C.G.S. § 75-1.1").

Texas - *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 55 (Tex. Ct. App. 1990) (for purposes of Texas CPA, "when a seller makes representations to a buyer, it is under a duty to know if the representations are true"), *aff'd*, 836 S.W.2d 160 (Tex. 1992).
2. State CPAs Vary On What Perspective Is Used To Evaluate Deceptiveness
a. Examples Of CPAs That Measure Deceptiveness Using A "Least Sophisticated Consumer" Standard
Connecticut - *Aurigemma v. Arco Petroleum Prods.*, 734 F. Supp. 1025, 1029 (D. Conn. 1990) (capacity to deceive is measured by effect on least sophisticated).
Texas - *RRTM Restaurant Corp. v. Keeping*, 766 S.W.2d 804, 808 (Tex. Ct. App. 1988) ("The applicable standard is 'whether the statement has a tendency to deceive the ignorant, the unthinking, and the credulous who do not stop to analyze but are governed by appearances and general impressions'") (citation omitted).
b. Examples Of CPAs That Measure Deceptiveness Using A "Reasonable Person" Standard
California - *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398-99 (E.D. Cal. 1994) (adopting reasonable consumer standard for evaluating deceptive advertising).
New York - *Blue Cross of W. New York, Inc. v. Corcoran*, 163 A.D.2d 877, 878 (N.Y.A.D. 1990) (deceptiveness must be judged by the overall impression to be reasonably expected on a person of average education and intelligence).
c. Examples Of CPAs Where The Applicable Standard Varies According To When The Allegedly Deceptive Actions Occurred
Missouri - *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 601-02 (Mo. 1993) (due to change in statutory language, actual deception standard after 1986 until such time as the attorney general establishes new standards for defining deception).
d. Examples Of CPAs That Have Unique Approaches For Evaluating Deceptiveness
Ohio - *State ex rel. Celebrezze v. Ferraro*, 578 N.E.2d 492, 494 (Ohio Ct. App. 1989) (an act is deceptive if "it has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts").
3. State CPAs Vary On Whether Failure To Disclose Is A Basis For Liability
a. Examples Of CPAs That Do Not Specifically Reference Omissions

California - Cal. Civ. Code § 1770(a) (2000) (no reference to omissions in 23 specifically proscribed activities).
b. Examples Of CPAs That Specifically Reference Omission Of Material Facts
Delaware - Del. Code Ann. tit. 6, § 2513(a) (2000) ("prohibiting misrepresentation or concealment, suppression or omission of any material fact, with intent that others rely thereon").
Illinois - 815 ILCS § 505/2 (1996) ("prohibiting the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact").
c. Examples Of CPAs That Determine Non-Disclosure Under The Same Standards As Any Other Allegedly Deceptive Or Unfair Act
Louisiana - *Anderson v. Howard Griffin Distribs., Inc.*, 554 So. 2d 695, 707 (La. Ct. App. 1989) (allegation of nondisclosure to be evaluated under deceptive standard).
Massachusetts - *Commonwealth v. Elm Med. Labs, Inc.*, 596 N.E.2d 376, 383 (Mass. Ct. App. 1992) ("deceptive acts or practice may consist of failure to disclose important information").
d. Examples Of CPAs That Have Express Non-Disclosure Provisions And Require An Intent That Consumers Rely On The Omission
Delaware - Del. Code Ann. tit. 6, § 2513(a) (2000) ("prohibiting … concealment, suppression or omission of any material fact, with intent that others rely thereon").
Illinois - 815 ILCS § 505/2 (1996) ("prohibiting the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact").
e. Examples Of CPAs That Require That Any Deception Be Intentional
Kansas - *Heller v. Martin*, 782 P.2d 1241, 1245 (Kan. Ct. App. 1989) (non-disclosure must be intentional)
New Jersey - *Chattin v. Cape May Greene, Inc.*, 591 A.2d 943, 945 (N.J. 1991) (non-disclosure must be intentional in order to be actionable).
f. Examples Of CPAs That Impose A Duty To Disclose Information Only When The Seller Knows Or Should Have Knowledge Of The Information

Illinois - *Greenberg v. United Airlines*, 563 N.E.2d 1031, 1036 (Ill. Ct. App. 1990) (no duty to disclose with respect to unforeseen developments).
Massachusetts - *Nei v. Burley*, 446 N.E.2d 674, 679-80 (Mass. 1983) (knowledge requirement applicable to duty to disclose claim).
New Mexico - *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347-48 (N.M. Ct. App. 1984) (seller must be aware of non-disclosure where CPA explicitly applies only to claims "knowingly made").
g. Examples Of CPAs That Impose A Duty To Disclose Information Regardless Of Whether The Seller Knows Or Should Have Knowledge Of The Information
Maryland - Md. Com. Law Code Ann. § 13-301(3) (2000) ("Failure to state a material fact if the failure deceives or tends to deceive"); *Golt v. Phillips*, 517 A.2d 328, 331 (Md. 1986) (no knowledge or intent required for non-disclosure to be actionable under the Maryland CPA).
4. State CPAs Vary On Whether Individual Reliance Must Be Demonstrated
a. Examples Of CPAs That Require No Showing Of Reliance
Connecticut - *Prishwalko v. Bob Thomas Ford, Inc.*, 636 A.2d 1383, 1388 (Conn. Ct. App. 1994) (stating that plaintiff need not prove reliance under state deceptive practices act).
b. Examples Of CPAs That Require That Plaintiffs Show Individual Reliance
Arizona - *Peery v. Hansen*, 585 P.2d 574, 577 (Ariz. App. 1978) (statutory fraud claim requires showing of damages, which in turn requires showing of reliance).
Georgia - *Delta Chevrolet, Inc. v. Wells*, 371 S.E.2d 250, 251 (Ga. Ct. App. 1988) ("[A] claimant who alleges the [Georgia Fair Business Practices Act] was violated as the result of a misrepresentation must demonstrate that he was injured as a result of the reliance upon the alleged misrepresentation").
c. Examples Of CPAs That Require A Showing Of Reliance Only With Respect To Certain Types Of Violations Or Relax The Required Demonstration In Certain Types Of Cases
Ohio - *Amato v. Gen. Motors Corp.*, 463 N.E.2d 625, 629 (Ohio Ct. App. 1982) ("proof of reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of a class").
Oregon - *Sanders v. Francis*, 561 P.2d 1003, 1006 (Ore. 1977) ("Whether ORS 646.638(1) requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged").

d. Examples Of CPAs That Require Reliance To Be Reasonable
Michigan - *Dix v. Am. Banker's Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (reasonable person standard for reliance).
e. Examples Of CPAs That Do Not Require Reliance To Be Reasonable
Arizona - *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) (in a private cause of action for statutory fraud, there must be actual reliance but it need not be reasonable); *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992) (same).
f. Examples Of CPAs That Require A Showing Of Materiality Rather Than Reliance
New York - *Geismar v. Abraham & Strauss*, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981) (no need for proof of reliance, sufficient to show that consumer misled in a material way).
g. Examples Of CPAs That Require A Demonstration That Defendant's Actions Induced The Plaintiff To Act Or Refrain From Acting
Hawaii - *Wiginton v. Pacific Credit Corp.*, 634 P.2d 111, 119 (Haw. Ct. App. 1981) (under CPA, injury must be induced by defendant's conduct).
Massachusetts - *Fraser Eng'g Co. v. Desmond*, 524 N.E.2d 110, 113 (Mass. Ct. App. 1988) (CPA does not require showing of reliance as long as there is causal relationship).
Washington - *Smith v. Olympic Bank*, 693 P.2d 92, 96 (Wash. 1985) (relevant standard under CPA is whether defendant's conduct induced plaintiff to act or refrain from acting).
h. Examples Of CPAs That Require A Showing Of Reliance To Demonstrate Proximate Cause In Order To Establish Damages
Delaware - *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074, 1077 (Del. Super. Ct. 1983) (while violation of Act exists "regardless of actual reliance by the plaintiff," damages were available because they were "a direct and proximate result of [defendant's] misrepresentations").
Georgia - *Agnew v. Great Atl. & Pac. Tea Co.*, 502 S.E.2d 735, 736 (Ga. Ct. App. 1998) ("the Act incorporat[es] the 'reliance' element of the common law tort of misrepresentation into the causation element of an individual claim" (internal quotation marks omitted)).
Maryland - *State v. Cottman Transmissions Sys., Inc.*, 587 A.2d 1190, 1201 (Md. Ct. App. 1991) ("the correct measure of restitution would be the sums spent by the consumer in reliance on the practice").

Massachusetts - *Maloney v. Sargisson*, 465 N.E.2d 296, 301 (Mass. App. Ct. 1984) (plaintiffs cannot recover where they "could not have relied upon [the alleged misrepresentations] to their detriment").
New Jersey - *Carroll v. Cellco P'ship*, 713 A.2d 509, 516 (N.J. Super. A.D. 1998) ("Although plaintiffs need not prove reliance under the Consumer Fraud Act, they must show an ascertainable loss as a result of defendant's conduct and a causal relationship.")
Texas - *McCrea v. Cubilla Condo. Corp.*, 685 S.W.2d 755, 759 (Tex. Ct. App. 1985) (misrepresentation must be producing cause of damages); *Cobb v. Dunlap*, 656 S.W.2d 550, 554 (Tex. Ct. App. 1983) ("belief and reliance go toward a showing of factual causation of damages").
Washington - *Nuttall v. Dowell*, 639 P.2d 832, 840 (Wash. Ct. App. 1982) ("[T]this is a private action in which plaintiff seeks recovery of damages and, as such, he must establish some causal link between defendant's unfair act and his injury.... Here, on conflicting evidence, the trial court found that plaintiff did not rely upon defendant's representations.").
D. Variations Concerning What Constitutes "Unfair" Or "Unconscionable" Behavior Under State CPAs
1. CPAs Vary In What Constitutes "Unfair" Behavior
a. Examples Of CPAs That Follow The FTC Standard Set Out In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 (1972), To Determine What Constitutes Unfair Behavior[7]
Florida - *Dep't of Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So. 2d 22, 26 (Fla. Ct. App. 1994) (reciting *Sperry & Hutchinson* standard).
Massachusetts - *See Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17 (1st Cir. 1985) (Massachusetts law) (using *Sperry & Hutchinson* standard).
b. Examples Of CPAs That Follow The Test More Recently Promulgated By The FTC To Determine What Constitutes Unfair Behavior[8]

[7] The *Sperry & Hutchinson* test focuses on (1) whether the challenged practice offends public policy (as reflected by common law, statutory, or other established concepts of unfairness); (2) whether the practice was immoral, unethical, oppressive, or unscrupulous; and (3) whether the practice caused substantial injury to consumers.

Washington - *See Blake v. Federal Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. Ct. App. 1985) (adopting new FTC unfairness test's emphasis on consumer injury).
c. Examples Of CPAs That Employ A Hybrid Of The Two Standards Or Employ Their Own Standard
California - California courts have developed their own standard in applying California Business & Professional Code § 17200 (2000), under which unfairness is determined by weighing the practice's impact on the victim compared with its business justification. *See Motors, Inc. v Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (Cal. Ct. App. 1980) ("In brief, the court must weigh the utility of the defendant's conduct against the gravity of harm to the [alleged victim]").
Connecticut - *See Vezina v. Nautilus Pools, Inc.*, 610 A.2d 1312, 1317 (Conn. Ct. App. 1992) (using the new FTC standard to amplify the third prong of the old test and refine the meaning of "substantial injury").
2. CPAs Vary In The Relevance Of Violations Of Other Laws
a. Examples Of Jurisdictions Where Violations Of Certain Other Laws Are Considered *Per Se* Violations Of The CPA
Massachusetts - 940 Mass. Regs. Code § 3.16(3)(4) (2001) (act or practice is violation of Massachusetts CPA if: (1) it fails to comply with existing local statutes, rules, or regulations meant to protect Massachusetts consumers or (2) it violates certain federal statutes).
b. Examples Of Jurisdictions Where Violations Of Certain Other Laws Are Not Considered *Per Se* Violations Of The CPA
Texas - Tex. Bus. & Com. Code § 17.43 (1999) ("A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter").

[8] The FTC's more recent three-part test provides that an unfair act: (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must be an injury that consumers themselves could not reasonably have avoided. *See* Reauthorization of the Federal Trade Commission Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess. 23 (1982), *codified at* 15 U.S.C. § 45(n) (2000).

3. CPAs Vary In What Constitutes "Unconscionable" Behavior
a. Examples Of CPAs That Expressly Prohibit "Unconscionable" Practices
Idaho - Idaho Code Ann. § 48-603C (2000)
Kansas - Kan. Stat. Ann. § 50-627 (1996)
Kentucky - Ky. Rev. Stat. § 367.170 (2000)
Michigan - Mich. Comp. Laws § 445.903 (1995)
New Jersey - N.J. Rev. Stat. § 56:8-1 (2000)
New Mexico - N.M. Stat. Ann. § 57-12-3 (2000)
Ohio - Ohio Rev. Code Ann. § 1345.03 (2000)
Texas - Tex. Bus. & Com. Code Ann. § 17.50 (2001)
Utah - Utah Code Ann. § 13-11-5 (2000)
b. Examples Of CPAs That Define Unconscionable Practices In Different Ways
Texas - *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985) ("Taking advantage of a consumer's lack of knowledge to a grossly unfair degree thus requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated").
New Jersey - *Meshinsky v. Nichols Yacht Sales, Inc.*, 541 A.2d 1063, 1066 (N.J. 1988) ("Acknowledging that 'unconscionability' is an 'amorphous concept obviously designed to establish a broad business ethic,' we have defined the term 'as [t]he standard of conduct contemplat[ing] good faith, honesty in fact, and observance of fair dealing'") (citations omitted).
c. Examples Of CPAs That Do Not Expressly Prohibit Unconscionable Practices But Use Unconscionability As A Basis For Determining Whether A Practice Was Deceptive Or Unfair
Connecticut - *See Murphy v. McNamara*, 416 A.2d 170, 177 (Conn. Super. Ct. 1979) (unconscionable agreement found to violate the CPA, where the price charged was abnormally high and the consumer lacked sophistication).

Illinois - *Lane v. Fabert*, 533 N.E.2d 546, 551 (Ill. Ct. App. 1989) (unconscionably high fee for little or no service constituted a CPA violation).
E. Variations In Other Standards Applicable To State CPA Claims
1. CPAs Vary Concerning The Required Notice
a. Examples Of CPAs That Require The Would-Be Plaintiff To Send A Detailed Written Demand To The Defendant, At Varying Dates, Before The Plaintiff Files A Complaint
Alabama - Ala. Code § 8-19-10(3)(e) (2000) ("At least 15 days prior to the filing of any action under this section, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be communicated to any prospective respondent by placing in the United States mail or otherwise.")
California - Cal. Civ. Code § 1782(c) (2001) (No action for damages may be maintained for a violation of section 1770 unless defendant notified of the need for correction, repair, or replacement and is given opportunity to make such correction).
Georgia - Ga. Code Ann. § 10-1-399(b) (2000) ("At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive practice relied upon and the injury suffered, shall be delivered to any prospective respondent.")
Massachusetts - Mass. Gen. Laws ch. 93A, § 9(3) (2000) ("At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon, and the injury suffered, shall be mailed or delivered to any prospective respondent.")
Texas - Tex. Bus. & Com. Code § 17.505 (2001) ("[A] consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint").
b. Examples Of CPAs That Require Plaintiff To Take Other Action Before Filing A Complaint
Mississippi - Miss. Code Ann. § 75-24-15(2) (2000) ("In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the attorney general").
c. Examples Of CPAs That Require That Notice Be Given To A Defendant Within A Prescribed Time Period

Indiana - *A.B.C. Home & Real Estate Inspection Inc. v. Plummer*, 500 N.E.2d 1257, 1262-63 (Ind. Ct. App. 1986) (overturning a CPA award where plaintiff failed to provide proper notice). *But see* Ind. Code §§ 24-5-0.5-2(6)(b)(i), 24-5-0.5-5 (2001) (limitations period will not apply to an "incurable deceptive act," which is one committed "as part of a scheme, artifice, or device with intent to defraud or mislead").
Wyoming - Wy. Stat. 40-12-109 (2000).
d. Examples Of CPAs That Require That A Plaintiff Provide Notice Of The Practice At Issue To The State Attorney General
Connecticut - Conn. Gen. Stat. Ann. § 42-110g(c) (1996) ("[T]he plaintiff shall mail a copy of the complaint to the attorney general").
Kansas - Kan. Stat. Ann. § 50-634(g) (2001) (notice "shall be given to the attorney general, but failure to do so" is not a defense).
Louisiana - La. Rev. Stat. § 51:1409.B (1996) ("Upon commencement of any action … the plaintiff's attorney shall mail copy of the petition to the attorney general and director" but failure to conform with this subsection does not effect any of plaintiffs rights under this subsection).
Oregon - Or. Rev. Stat. § 646.638(2) (1999) (party bring action shall mail copy to attorney general; no judgment will be entered until proof of mailing is filed).
2. Some States Require A Showing That A Public Interest Has Been Affected
Georgia - *See Medley v. Boomershine Pontiac-GMC Truck, Inc.*, 449 S.E.2d 128, 131 (Ga. Ct. App. 1994) (unless defendant's actions have sufficient impact on the consumer marketplace, it is not regulated by the Georgia consumer protection act).
New York - *H;0 Swimwear, Ltd. v. Lomas*, 560 N.Y.S.2d 19, 21 (N.Y. App. Div. 1990) (noting that the consumer protection act "has been held to apply solely to matters affecting the public interest and involving transactions of a recurring nature").
South Carolina - *Jefferies v. Phillips*, 451 S.E.2d 21, 23 (S.C. Ct. App. 1994) (must prove adverse effect on public at large with specific facts); *Daisy Outdoor Adver. Co. v. Abbott*, 451 S.E.2d 394, 397 (S.C. Ct. App. 1994) ("Merely offering evidence, however, that shows a wrongful act has the potential for repetition or that it occurs in the course of business is not enough to establish a violation of the [consumer protection act] if, as the evidence shows here, the conduct adversely affects only the parties involved."), *aff'd in part, rev'd in part*, 473 S.E.2d 47 (S.C. 1996).

Washington - *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) ("We hold that to prevail in a private CPA … a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in a trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation."); *Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.*, 876 P.2d 948, 953 (Wash. Ct. App. 1994) ("The court's language in *Hangman Ridge* clearly requires a showing of public interest impact, separate and apart from a showing of an unfair and deceptive act.").
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South Carolina - *Payne v. Holiday Towers, Inc.*, 321 S.E.2d 179, 182 (S.C. Ct. App. 1984) (treble damages available under CPA only where defendant's violation is knowing and willful or defendant acted in bad faith).
b. Examples Of CPAs That Will Award Treble Damages In The Absence Of Any Showing Of Intent
North Carolina - *Marshall v. Miller*, 276 S.E.2d 397, 402 (N.C. 1981) ("Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown").
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North Carolina - N.C. Gen. Stat. § 75-16.1 (2000) (fees may be awarded only if the conduct is willful and there is an unwarranted refusal to settle).
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Florida - *Smith v. Bilgin*, 534 So. 2d 852, 859 (Fla. Dist. Ct. App. 1988) (granting fees to defendant despite finding action beyond CPA scope).

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No. 02-530

IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, ET AL.,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION AND FORD MOTOR COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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This case, challenging Ford and Firestone's sale of defective Explorers and tires, represents the most significant consumer class action to come before this Court in at least a decade. Each class member has essentially the same case about the same products; but for the claims' small value, these would confront courts across the country with the exact same inquiry. Although Respondents seek to introduce extraneous matters, some of which might be germane to personal injury actions sounding in tort, this case really presents two overriding questions: First, can a nationwide class action ever be brought against a manufacturer who nationally marketed a product it knew to be defective and whose "conduct . . . was uniform across the nation," Pet. App.3a? Second, may a federal court reject state-created contract and consumer protection claims in favor of tort-only recovery, and use this newly-minted federal common law as a basis to deny class certification? Each of these questions has tremendous national import and reveals a decisive split between the Seventh Circuit and other Courts of Appeals.

1. The Circuits are Divided on the How to Determine Whether Common Questions of Law Predominate.

a. Respondents fail utterly to come to terms with the clear division among the Circuits on the appropriate method for determining whether common questions of law predominate in a class action in which more than one state's law will apply.

First, Respondents argue that there is no conflict by pretending that the court below actually engaged in the detailed examination of variations among states' laws that they concede the Third, Fifth, Ninth and D.C. Circuits require. Thus, Respondent Bridgestone/Firestone ("Firestone") says that the court below "assessed the relevant law," and "perform[ed] the evaluation" called for by *Walsh v. Ford Motor Co.*, 807 F. 2d 1000 (D.C. Cir.), cert. denied, 482 U.S. 915 (1987), *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011 (9th Cir. 1998), *Castano v. American Tobacco Co.*, 84 F. 3d 734 (5th Cir. 1996), *In re Prudential Ins. Co.*, 148 F. 3d 283 (3d Cir.

1998), and the case all these others followed, *In re School Asbestos Litig.*, 789 F. 2d 996 (3d Cir. 1986), looking at "differences in state law" to see if a "creditable showing" could be made that the relevant laws could be grouped into a small number of patterns. Firestone Brief in Opposition ("Fst. Opp.") 10-13. Respondent Ford takes the same tack, claiming the court "*did* conduct such an analysis." Ford Opposition ("Ford Opp.") 16.

But the opinion below does not support this fanciful reading. As Respondents elsewhere concede "[t]he court did not definitively determine any particular state's law relating to plaintiffs' claims." Fst. Opp. 18-19; see also Ford Opp. 9.

The Court of Appeals instead announced a rule that "[n]o class action is proper unless all litigants are governed by the same legal rules," Pet. App. 3, and decertified both classes with respect to all of Petitioners' causes of action – express warranty, implied warranty, consumer protection, and unjust enrichment – on the undifferentiated assertion that "state laws about [them] differ." Id. at 9a. This blanket holding replaces the predominance requirement with a "uniformity" requirement and would prohibit class actions whenever choice of law rules make multiple states' laws applicable. Pet. 14-18. It conflicts directly with at least four separate Circuit holdings, as well as the Fourth Circuit's determination that courts facing multistate class actions should look to the *School Asbestos* methodology. See *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993).

Ford urges that the Court of Appeals should not be taken "*literally*." Ford Opp. at 13 (emphasis in original). Firestone says the rule is not "the essence" of what the court below held. Fst. Opp. at 10. But this is what the Court of Appeals said and held, and the uniformity requirement it invented and imposed is already being applied by lower courts in the Seventh Circuit. See, e.g., *In re Trans Union Corp. Privacy Litig.*, 2002 U.S. Dist. LEXIS 17209, at *40 (N.D. Ill. September 10, 2002).

By contrast, what would have been required in the other

Circuits cited in the Petition is, as Justice Ginsburg jointly wrote when sitting on the D.C. Circuit:

> A considered predomination determination . . . The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.

Walsh, 807 F.2d at 1017 (internal quotation marks and citations omitted); see also, *e.g.*, *Castano*, 84 F. 3d at 742-743 ("extensive" review of state law variations is required).

Second, and alternatively, Ford now clumsily argues that the *district* court engaged in the proper analysis. Ford Opp. 1, 16. The record is to the contrary. All the district court ever said about the differences in state law was that the state laws relating to all of the causes of action in the complaint – including those dismissed in the same opinion – varied sufficiently as a general matter that the court had to engage in a choice of law analysis. Ford Opp. App. 4a; see Fst. Opp. 8. Thereafter concluding that only the law of Michigan and Tennessee would apply, it also said that it followed from the fact that only two states' laws would apply that common issues of law predominated, Pet. App. 40a n.17.[1] The district court, though, did *not* conclude the obverse – that common issues would not predominate if the laws of multiple states applied. Cf. Ford Opp. 7. Its choice of law decision obviated the need for any analysis of relevant distinctions among the laws of the various states.[2]

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[1]It concluded, too, that it would not have to subclass based on applicable state laws because of its choice of law ruling. Pet. App. 67a n. 45.

[2]The issue at this certiorari stage is not what the outcome would be of the extensive analysis of state law variations required by other Circuits, but whether there is a conflict about the legal standard for deciding whether a class can be certified in cases where different state's laws will be applied. In this precise context, as *Walsh* and other courts suggest, the

b. Somewhat inconsistent with their claim that the court below did what other Courts of Appeals would have, Respondents also attempt to distinguish the cases on which Petitioners rely. Ford Opp. 15-17. This effort cannot succeed.

First, in *School Asbestos*, the Third Circuit upheld certification of a nationwide litigation class, despite the applicability of the laws of different states. All Respondents say about this direct conflict is that *School Asbestos* is "discredited" or has "lost all weight as authority." Ford Opp. 17 n. 7. There is no basis for this assertion. See, e.g., *Prudential*, 148 F. 3d at 315 (relying on and applying *School Asbestos*); *Castano*, 84 F. 3d at 742 (relying on and applying "[t]he able opinion in *School Asbestos*").

Respondents next weakly suggest that *Walsh* and *Castano* do not conflict with the decision below because they "reversed" certification. Ford Opp. 15; see also Fst. Opp. 11. *Walsh* actually remanded for application of the appropriate standard, 807 F. 2d at 1019; *Castano* specifically adopted the *School Asbestos* standard for predominance, but did not remand because of an "independent" finding that certification

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analysis of variations in state law must be undertaken in the first instance by the district court. But regardless, where, as in this case, there is a Circuit split about a legal standard and the correct legal standard was never applied below nor the evidence pertinent to it considered, this Court routinely grants certiorari, ultimately remanding for the lower courts to determine the legal question under the proper standard in the first instance. *E.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 237-239 (1995).

Moreover, given the minor variations in applicable state law, common issues of law would be held to predominate under the approach taken in other Circuits. See Pet. 18-19 n.11. The state laws at issue here fall into just a few patterns. The Court of Appeals decertified as to *all* of Petitioners' causes of action. Respondents cannot show significant variation as to even one, let alone – what they would have been required to do in other Circuits to obtain decertification – all four. To take just one obvious example, with respect to implied warranty law, even Respondents argue only that some states require privity. See Fst. Opp. 9 n. 7; see also Ford Opp. App. 100a-105a (only relevant difference listed is privity). As the district court noted, this is a straightforward distinction that may be easily managed through subclasses. See Pet. 7.

was not "superior," in part because the high value of each smoker's tort suit rendered individual litigation a strong alternative. 84 F. 3d at 746, 748. In any event, there is a clear conflict between the standards applied in those cases and by the court below.

Finally, Respondents attempt to distinguish *Prudential* and *Hanlon*, in which the Third and Ninth Circuits certified multi-state law nationwide classes, as "not comparable" because they involved settlement rather than litigation classes. Ford Opp. 16; see also Fst. Opp. 11. But this Court has held that the predominance inquiry is unaffected by any distinction between settlement and litigation classes, since it involves "questions that pre-exist any settlement." *Amchem*, 521 U.S. at 623. And both the Ninth and Third Circuits explicitly stated that their rulings were not dependent on settlement considerations. See *Hanlon*, 150 F. 3d at 1020, 1022, 1025 (court's conclusion "independent of settlement considerations"); *Prudential*, 148 F. 3d at 314 (holding, under *Amchem*, "potential benefits of settlement are [not] relevant to the predominance inquiry.").[3]

2. No Factual Differences Required Decertification of Both Classes on All Causes of Action.

a. Firestone alone urges that, because of factual differences among class members' claims, certification would have been inappropriate here even if the court below had taken the proper

[3]Respondents argue, irrelevantly, that the decision below is "consistent" with others denying certification of nationwide classes, Fst. Opp.14-17. It has never been Petitioners' position, though, that nationwide class actions involving the laws of different states must always be certified. Our point is rather that in other Circuits, as Respondents concede, a detailed evaluation of variations among the relevant state laws is required under Rule 23 to determine *whether* a class action involving more than one state's law should be certified. Nor does the denial of certiorari in the cases cited by Firestone, id. 14, have any bearing here. For example, the decision in *Sikes v. AT&T*, 281 F. 3d 1350, 1367 (11th Cir.), cert. denied, 123 S. Ct. 117 (2002), rested on "plaintiffs' difficulties in showing injury and damages as a class," and did not implicate the predominance and superiority issues raised here.

approach to examining variations in applicable state laws, and that certiorari should thus "await a more appropriate case." Fst. Opp. 27. It is in error.

The holding that certification required uniform law did not depend on any underlying finding of fact, and Firestone does not urge that Petitioners' claim of error depends on a challenge to a fact found below. It makes the narrower claim that even if this Court were to reverse on the predominance of common questions of law, "the case could not proceed as a class action because individual issues of fact predominate." Id. at 27. But neither the facts found by the district court nor any conclusion about the facts drawn by the Court of Appeals – with respect to either of the certified classes, let alone both – has any implications for the propriety of certiorari.[4]

The district court's findings of fact – left undisturbed by the Court of Appeals – simply cannot support a conclusion that individual issues of fact predominate with respect to either the Explorer class or the tire class. The district court found, contrary to the position of Respondents, Fst. Opp. 25; Ford Opp. 7, that the defects alleged would be amenable to "common proof." Pet. App. 40a-45a. As to the Explorers, the district court found as a fact that they were similar in all respects relevant to the surviving class claims. Pet. App. 42a-44a. The only relevant distinction, that between Explorers with allegedly defective Firestone tires and those without, was addressed through creation of a single subclass. Pet. App. 73a.

As to the tires at issue, the district court also found as a fact that they were similar in all respects relevant to the remaining claims, Pet. 5-6, addressing the minor variations among them with six subclasses. See Pet. 6; Pet. App. 79a-81a. This should be unsurprising: NHTSA for example, had

[4]Tellingly, Firestone does not even make this claim with respect to the Explorer class, and Ford makes a different and much narrower argument altogether, see infra 7-8. For Firestone's argument to have any purchase, Firestone would of course have to show that individual facts predominate with respect to *each* class and each of Petitioners' causes of action.

over 17 million of the tires at issue here recalled, finding that they all shared the same defect claimed in this case.

The Court of Appeals did assert that there were differences among tires and Explorers that, it surmised in dictum, would have defeated certification of "50 state classes." See Fst. Opp. 25-26 (relying on the court's assertion about the tires). This assertion, though, cannot make any difference to the propriety of review before this Court if there are not, *in reality*, factual differences relevant to the underlying claims.

There are not. The court's assertion of debilitating factual differences is fatally infected by its legal error: the court failed to apply the other Circuits' approach to assessing the predominance of common questions of law, which would have required, as its first step, an examination of the elements of each cause of action. See Pet. 10-11, 19 n.11. As a consequence it articulated factual differences that are not relevant to the elements of the surviving class claims.

With respect to the Explorers, *all* of the purported factual differences the court described involve either the way in which the vehicles were used or differences in resale price. Pet. App 9a-10a. With respect to the tires, most of the claimed differences involve the way they were used. Pet. App. 10a.

But these issues are irrelevant to the consumer claims in this case. The theory behind all of Petitioners' causes of action is that, because of concealed defects, Respondents' products were worth less than Petitioners paid at the time of initial sale – something to which use or resale price is irrelevant. See Pet. 11. Because the court below failed to examine the elements of the causes of action actually asserted, its conclusions about factual commonality with respect to each class – like Firestone's, Fst. Opp. 26 – were based upon purported factual differences that are not relevant to the consumer claims presented in this case. Those conclusions therefore can have no bearing here.

b. Perhaps recognizing this, Ford argues only that

Petitioners' failure "to seek review of" the question of factual commonality renders review inappropriate. Ford Opp. i, 12. Obviously, though, since the Court of Appeals' conclusions about factual differences are just a consequence of its legal errors, Petitioners need not separately "seek review" of those conclusions in order for this Court properly to grant review.

3. The Decision Below Violates Principles of Federalism.

The Court of Appeals used the "superiority" inquiry to give force to an economic legal theory of its own devising that a tort-only regime would provide the greatest societal benefit by fixing the appropriate levels of deterrence and compensation. Pet. 19-25. On the basis of that theory the court found, as Respondents acknowledge, not that individual litigation of class members' claims was "superior" to class certification, but that NHTSA regulation and suit by persons not in the classes was superior to *any* adjudication in *any* forum of the class claims, which the court derided as brought by "uninjured buyers." Fst. Opp. 20. State laws provide that those who get less than they pay for because of concealed conditions in products they purchase are injured and entitled to redress. The court's refusal to apply those laws violates *Erie* and conflicts with other Circuits, which do not read the "superiority" requirement in this novel way. Pet. 24-25.

Respondents don't even address this argument, suggesting Petitioners' complaint is merely with the court's conclusion that most states don't permit recovery for economic loss claims absent physical injury.[5] The *Erie* point, though, is that

[5]Respondents and the court below do wildly mischaracterize state law. See Pet. 20-23. None of the Courts of Appeals and highest state courts they both cite, see Fst. Opp. 19-20 n. 15, rejected a contract or consumer protection claim for benefit-of-the-bargain damages because of an absence of physical injury or a lack of "manifestation" of the value-decreasing defect. See Pet. 22-23 n. 14. State law does not adopt Firestone's frightening suggestion that defective tires are worth the price paid because less than one percent have failed and the rest have so far "function[ed] without incident for thousands of miles." Fst. Opp. 20 n. 16. Firestone's argument is really that its products should not be found defective, e.g., Fst.

the court below foreclosed the litigation of viable state law claims here based on its own economic model of how substantive law should be designed. In our federal system, to decide on the basis of such a federal common law principle not to let these claims proceed goes beyond the power of the federal court. See *Erie v. Tompkins*, 304 U.S. 64, 78 (1938).

The court below did not even claim that *no* states permit no-physical-injury recovery in contract or consumer protection. See Pet. App. 7a (grudgingly acknowledging that a "minority" of states do). Yet it held that, though such claims exist under state law, it would be "superior" for any such viable claims *not* to be litigated, in favor of "[r]egulation by the NHTSA coupled with tort litigation by persons suffering physical injury." Pet. App. 11a. In arrogating to itself the power to judge the wisdom of state lawmakers who created these causes of action, the court violated *Erie*. Adjudication of state law claims in federal court "does not carry with it the generation of rules of substantive law." *Gasperini v. Center for Humanities*, 518 U.S. 415, 426 (1996).

4. The Superiority Determination Turned on the Claims' Small Value.

Contrary to Respondents' assertion, Ford Opp. 20-22, Fst. Opp. 22, the Court of Appeals' decision did use the fact of the small value of Petitioners' claims – most seek no more than several hundred dollars – and the consequence that they would not be litigated individually in finding that class certification would not be superior. The court did not hold that individual litigation by class members for economic loss would be preferable to certifying a class, but that NHTSA regulation and tort suits for physical injury by persons *outside* the class together would be.[6] In other words, the low value of the

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Opp. 20 n. 15, a merits argument irrelevant to class certification.

[6]NHTSA's focus is not on compensation for purchasers of defective products, see Ford Opp. 8 n. 3, and in its October, 2001, report, NHTSA specifically disclaimed any responsibility for finding liability or assessing damages. See http://www.nhtsa.dot.gov/hot/Firestone/firestonereport.pdf

individual claims – i.e., the unlikelihood that they would be brought – was necessary to the court's conclusion that it would be "superior" to decertify the class. This ruling conflicts with this Court's teaching and the decisions of other Circuits where small value weighs in favor of superiority. See Pet. 25-27.[7]

5. There is a Division on the Meaning of Efficiency.

Finally, Respondents attempt to avoid the Circuit conflict about the meaning of the word "efficient" in Rule 23. For the court below, the "efficiency" requirement in the Rule calls for the creation of a market of judgments in individual cases in order to guide settlement, rather than a determination of the method of adjudication that will best conserve judicial and litigant resources, even where the other Rule 23 criteria are met. See Pet. App. 11a-12a. Ford's halfhearted attempt to recast the lower court's holding is obviously wrong; it did not merely hold that efficiency could not justify certification where the "commonality" requirement is not met. See Ford Opp. 10, 11, 23-25.[8] The court ruled on the *meaning* of the word "efficient" to which the Rule, by its terms, is keyed and as to which Courts of Appeals – including the Third, Fifth, Sixth, and Ninth – have now expressed conflicting views. Pet. 27-30. As similarly expressed by the Fourth Circuit, other Circuits understand the efficiency inquiry to ask whether "the class mechanism may advance this action and reduce the need for repetitive litigation in this area." *Central Wesleyan,* 6 F.3d at 180. Respondents do not even attempt to address the conflict. Ford Opp. 25 n. 9.

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at 6. Nor, as Ford claims, Ford Opp. at 3-4 n. 1, has NHTSA rejected "the types of allegations" made against Ford in the Complaint, having merely decided against an investigation of one limited aspect of Explorer design.

[7]Petitioners of course do not argue that the small value of claims warrants overlooking, ignoring or bending the requirements of Rule 23. See Ford Opp. 21-22; Fst. Opp. 23.

[8]Nor was its efficiency ruling based on requirements of federalism, Ford Opp. 23-24. See Pet App. 7a, 12a (federalism references relating only to application of what the court concluded was the correct Indiana choice of law rule).

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